No. 91-913

In The Supreme Court Of The United States

OCTOBER TERM, 1991

JOHN R. PATTERSON, TRUSTEE,

Petitioner,

v.

JOSEPH B. SHUMATE, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX - VOLUME II

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TABLE OF CONTENTS

VOLUME I

TABLE OF CONTENTS

VOLUME II

The following decision, opinions, and order have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

COLEMAN FURNITURE CORPORATION
PENSION PLAN

EIGHTH AMENDMENT
CERTIFICATE OF VOTE

I, R. D. Gunn, HEREBY CERTIFY that I am the duly elected, qualified and acting Secretary of Coleman Furniture Corporation ("the Corporation").

I FURTHER CERTIFY that at a meeting of the Board of Directors of the Corporation held at the offices of the Corporation on /s/13th of May, 1980, at which meeting a quorum was present and acting throughout, the following vote was unanimously adopted:

VOTED: That the Coleman Furniture Pension Plan be amended effective as of December 1, 1978 as follows:

Section 16.4 is deleted in its entirety and the following Section 16.4 substituted therefor

16.4 Benefits subject to adequacy of Trust Fund

The Company does not guarantee the payment of benefits hereunder and all persons shall look solely to the Trust Fund and the Pension Benefit Guaranty Corporation (PBGC) for any payments under the Plan. In all events, no Participant shall have any recourse toward the satisfaction of his Accrued Benefit from other than assets of the Plan or the PBGC, if there shall be a

PBGC liability present.

I FURTHER CERTIFY that the foregoing vote is still in full force and effect and has not been modified, amended or rescinded.

WITNESS my hand as Secretary and the Seal of the Corporation this /s/13th day of /s/May, 1980.

(Corporate Seal) /s/R. D. Gunn Secretary

COLEMAN FURNITURE COMPANY PENSION PLAN

SEVENTH AMENDMENT

CERTIFICATE OF VOTE

I, R. D. Gunn, HEREBY CERTIFY that I am the duly elected, qualified and acting Secretary of Coleman Furniture Company ("the Corporation").

I FURTHER CERTIFY that at a meeting of the Board of Directors of the Corporation held at the offices of the Corporation on /s/ May 8th, 1979, at which meeting a quorum was present and acting throughout, the following vote was unanimously adopted:

VOTED: To amend the Coleman Furniture Pension Plan as follows:

A. Amendments effective January 1, 1979:

1. The phrase "(or be retired by the Company)" is deleted from the first sentence of Section 5.1.

2. The first sentence of Section 5.2 is amended to read as follows:

A Participant who remains in the employment of the Company after his normal retirement date may elect to retire on the first day of any month after such date.

B. Amendment effective January 1, 1978:

Section 2.20 is amended to read as follows:

2.20 Primary Social Security Benefit defined

"Primary Social Security Benefit" of a Participant as of any date (computation date) means his monthly primary insurance amount under the

Social Security law (the Federal Social Security Act, as amended, and regulations, rulings and judicial decisions thereunder), computed on the basis of the following assumptions:

(a) That the first month for which he is entitled to old-age insurance benefits under such law is the later of the calendar month in which the computation date occurs and the calendar month in which his 65th birthday occurs;

(b) That he will have no compensation for the purposes of such law in or after the calendar year in which the later of such calendar months occurs;

(c) That, in the case where the computation date occurs in an earlier calendar year than the calendar year in which his 65th birthday occurs, his compensation for the purposes of such law during the calendar year in which the computation date occurs and during each subsequent calendar year, if any, prior to the calendar year in which his 65th birthday occurs will be the same as his current applicable compensation on the computation date;

(d) That the taxable wage base applicable to the calendar year in which the

computation month occurs continues to be applicable to each subsequent calendar year (where the computation month is the calendar month next preceding the calendar month in which the computation date occurs, if the computation date occurs on the first day of a calendar month, but if the computation date does not occur on the first day of a calendar month, the computation month is the calendar month in which the computation date occurs);

(e) That no cost-of-living increases in benefits are required for any calendar month after the computation

month;

(f) That, for the purposes of determining his average indexed monthly earnings and of determining his primary insurance amount from his average indexed monthly earnings (where either such determination is required), the index wages (the average of the total wages reported to the Secretary of the Treasury for any calendar year for use in compiling the indexes employed in computing average indexed monthly earnings, all as prescribed by the Social Security law) for each calendar year after the

reference year (the second calendar year preceding the calendar year in which the computation month occurs) are the same as for the reference year;

(g) That amendments to the Federal Social Security Act which become law more than six months after the computation date are not in effect;

(h) That, if the computation date occurs before January 2, 1979, the Social Security Amendments of 1977 are not in effect;

(i) That, if the computation date is his normal retirement date and occurs on a January 1st, he had no

compensation for the purposes of the Social Security law in the calendar year immediately preceding the computation date.

There shall be no change in the Primary Social Security Benefit of a Participant after the termination of his employment, except as provided in Section 6.4 and except as otherwise specifically provided elsewhere in the Plan.

C. Amendments effective December 1, 1976:

1. Paragraph (c) of Section 4.1 is deleted and Paragraphs (d) and (e) are relettered as (c) and (d).

2. Paragraph (d) of Section 4.2 is deleted.

3. Section 4.3(a)(i) is amended by inserting the phrase, "or eligibility computation period", immediately after the phrase, "Plan Year".

4. Section 4.3(a)(ii) is amended by inserting the phrase, "or eligibility computation period", immediately after the phrase, "Plan Year".

5. Section 4.3(a)(iii) is amended to read as follows:

(iii) each hour for which the Employee is directly or indirectly paid, or entitled to payment, by the Company or an Affiliated

Company for reasons (such as vacation, sickness or disability) other than for the performance of duties, such hours to be determined and credited pursuant to the provisions of paragraphs (b) and (c) of Section 2530.200b-2 of the regulations issued by the United States Department of Labor under ERISA defining "hour of service", which paragraphs are hereby incorporated herein by reference.

6. Section 4.3(b) is amended to read as follows:

(b) For the purpose of determining Benefit Accrual Service, an Hour of Service

for an Employee means an hour determined in accordance with paragraph (a) above, but any hour attributable to employment with an Affiliated Company shall be disregarded.

7. Section 5.4 is amended to read as follows:

5.4 Retirement defined

As used in this Plan, "retirement" means termination of employment with the Company on a normal, early, disability or deferred retirement date of a Participant who is eligible to retire on such date in accordance with the provisions of the Plan, and

no benefits shall become payable to a Participant or former Participant before his termination of employment with the Company. However, if the termination of employment of a Participant with the Company occurs on a day when he meets all the eligibility requirements of the Plan for retirement except that such day is not the first day of a month, such termination shall nevertheless be considered a retirement, but his retirement date shall be the first day of the month next following such termination, if he is

living on such day, and his death between such termination and such day shall be considered death while in the employment of the Company.

8. Article VI is amended by adding the following new Section 6.6 at the end thereof:

6.6 Provision to prevent benefit duplication with other plans

Notwithstanding any other provision of the Plan to the contrary, benefits of an Employee payable under the Plan attributable to the same service to which other pension benefits of such Employee are also attributable shall be

reduced (but not to less than zero) by the actuarial equivalent of such other benefits. For this purpose, "other pension benefits" are benefits payable under another defined benefit pension plan which is qualified under Section 4.01(a) or 4.03(a) (or any replacing section) of the Internal Revenue Code and to which the Company contributes or has contributed.

9. Section 7.1 is amended by changing the phrase, "normal retirement date", to "65th birthday".

10. Article VIII is amended to read as follows:

ARTICLE VIII

NORMAL FORM OF RETIREMENT BENEFITS

8.1 Normal form of pension

Except as otherwise provided in Sections 8.2 and 8.3, the normal form of pension payable under the Plan to a Participant shall be a monthly pension payable to the Participant during his lifetime, the first payment to be due on the date of commencement of his benefits under the Plan, and the last payment to be due on the first day of the calendar month in which his death occurs.

8.2 Normal form of pension for Participants married on date benefits commence

The normal form of pension payable under the Plan to a Participant who (i) begins to receive his benefits under the Plan on or after his normal

retirement date or the date on which he has satisfied the requirements for early retirement under Section 5.3, (ii) is married on the date payment of such benefits commence and (iii) has not made an election under Section 8.4, shall be the joint and survivor form of payment with the person to whom the Participant was married on the date payment of such benefits commence designated as his joint annuitant. Under this form of payment, the Participant shall receive a monthly pension beginning on the date of commencement of his benefits under the Plan and payable during his lifetime, the amount of such pension to be the Actuarial Equivalent of the pension payable in the normal form described in Section 8.1. If the Participant predeceases his joint

annuitant, then fifty percent (50%) of the Participant's reduced pension shall be paid to the joint annuitant during such person's remaining lifetime, the first such payment to commence on the first day of the month next following the Participant's death, the last such payment to be paid on the first day of the calendar month in which the joint annuitant dies. However, if the joint annuitant to whom a survivor annuity is payable under this Section 8.2 predeceases the Participant, the Participant shall continue to receive his actuarially reduced pension during his remaining lifetime, the last such payment to be due on the first day of the month in which he dies.

8.3 Normal form of pension for certain Participants married on

date of death

The normal form of pension payable under the Plan to a Participant (i) who dies on or after his 65th birthday while in the employment of the Company and while the pre-retirement death benefit described in Sections 10.4 and 10.5 is not in effect for him, or (ii) whose employment with the Company terminates (due to retirement or any other reason but death) on or after his 65th birthday or the date on which he has first satisfied the age and service requirements for early retirement under Section 5.3 and thereafter dies before the commencement of his benefits under the Plan, (iii) who is married on the date of his death and (iv) who has not made an election under Section 8.4 prior to his death, shall be the joint and

survivor form of payment described in Section 8.2 with his surviving spouse (that is, the person to whom he was married on the date of his death) designated as his joint annuitant. The monthly pension payable to the surviving spouse shall be determined as if the Participant had lived to begin receiving his pension under such form (with such designated joint annuitant) on the first day of the calendar month next following his death and had thereafter died in such month and, if he dies while in the employment of the Company, as if his employment had terminated just before his death. However, such pension shall commence on the first day of the calendar month next following his death, if his surviving spouse is living on that day, notwithstanding

the fact that the next preceding sentence would call for such pension to commence on the first day of the calendar month next following the Participant's assumed date of death.

8.4 Election not to take the joint and survivor annuity

A married Participant may elect not to take the joint and survivor annuity described in Section 8.2 by delivering to the Committee, during the election period described below, his written election to have his benefits paid in the normal form of payment described in Section 8.1 or in an optional form of payment described in Article IX. The election period during which the Participant may elect not to take such joint and survivor annuity is the period beginning on the date the information described in the first

sentence of Section 8.5 is furnished to him and ending on the date payment of his benefits under the Plan commence, provided, however, that in no event shall such election period be less than 90 days. It is further provided, that if the Committee is required to furnish to the Participant the additional information described in the third sentence of Section 8.5, such election period shall be extended to the extent necessary to include the 90 days immediately following the date such additional information is mailed or personally delivered to the Participant. The Participant may revoke such election by filing a written revocation with the Committee at any time during such election period and such revocation shall be effective upon receipt by the

Committee. No such revocation shall prevent the Participant from making a subsequent election not to take the joint and survivor annuity under the conditions described above.

8.5 Information to be furnished to Participant

The Committee shall furnish the Participant a general description, written in non technical language, of the joint and survivor annuity described in Section 8.2, the circumstances under which such annuity shall be provided unless he elects not to take such annuity, the availability of such election and a general explanation of the relative financial effect upon his pension of making such an election. Such information shall be furnished to the Participant approximately nine months before (i)

the date he will first satisfy the age and service requirements for early retirement under Section 5.3, or (ii) his 65th birthday, whichever is earlier, provided, however, that, if he satisfies such early retirement requirements on the date that he commences his participation in the Plan or if he commences such participation at, after or within nine months before his 65th birthday, such information shall be furnished to him on or about the date he commences such participation. The Committee shall also furnish the Participant, upon his written request delivered to the Committee within the election period described in Section 8.3, a written explanation, in non-technical language, of the terms and conditions of such annuity and the financial

effect upon his pension (in terms of dollars per pension payment) of making an election not to take such annuity. Such additional information shall be furnished to the Participant within 30 days following the date the Participant's written request is received by the Committee.

8.6 Special election

In the case of a Participant whose death, retirement or termination of employment occurred after November 30, 1976 and to whom an election not to receive his pension in the form of a qualified joint and survivor annuity (an annuity for the life of the Participant with a survivor annuity for the life of his spouse which is neither (A) less than 50% of, nor (B) more than 100% of, the annuity payable during the joint lives of the

Participant and his spouse) has not been previously made available (and will not become available in normal course), such Participant (or, if he has died, his personal representative) may make an election (whether or not such spouse is then still living) to receive the balance of such pension (with appropriate adjustment of such benefit to reflect payments received in the form of a qualified joint and survivor annuity prior to the exercise of such election) in the form of a monthly pension for the life of the Participant only or in any form of pension described in Section 9.3 or permitted by the Company and the Trustee under Section 9.4. Such election may be made at any time before the 91st day following the day the Committee mails or personally

delivers to the Participant (or his personal representative) notice of the availability of such election and the applicable information described in the first sentence of Section 8.5. However, if the Participant (or his personal representative) makes a request before such 91st day for the additional information described in the third sentence of Section 8.5, the Committee shall personally deliver or mail (first class mail, postage prepaid) such information to the Participant (or his personal representative) within 30 days from the date of such request (and the Committee need comply with only one such request) and the time for making such election shall be extended to the extent necessary to include the 90 calendar days immediately following

the day the requested additional information is mailed or personally delivered to the Participant (or his personal representative). Such election, to be effective, must be submitted to the Committee in writing.

8.7 Applicability to former Participant

For purposes of this Article VIII, the term "Participant" shall include a former Participant.

11. Section 9.8 is amended to read as follows:

9.8 Small pensions

If the monthly amount of any pension hereunder is less than ten dollars, the Committee may, in its sole discretion, direct the Trustee to pay such pension quarterly, semi-annually, annually or in a lump sum, in an amount which is the Actuarial

Equivalent of such pension, but such pension shall not be paid in a lump sum pursuant to this Section 9.8 if the lump sum Actuarial Equivalent of such pension is more than $1,750.

12. The following new sentences are added at the end of Section 10.3:

Furthermore, if the spouse of a deceased Participant or former Participant is entitled to receive a benefit under the Plan in respect of such Participant or former Participant in the form of a life annuity and if such spouse, pursuant to the first sentence of this Section 10.3, makes a request to the Committee in writing to receive such benefit in some other manner, the Committee shall furnish such spouse, within a reasonable amount of time after the Committee receives such request, a written

explanation in nontechnical language of the life annuity and any other form of payment which may be selected. This explanation must state the financial effect (in terms of dollars) of each such form of payment. The Committee need not respond to more than one such request.

13. Section 10.4. is amended to read as follows:

10.4 Automatic pre-retirement death benefit

If a married Participant dies after November 30, 1976, before his normal retirement date, while in the employment of the Company and after he has satisfied the age and service requirements for early retirement (as set forth in Section 5.3), his spouse shall be eligible for the spouse's pension described in Section 10.5.

below. (As used in this Section 10.4 and in Section 10.5. below, the term "Participant" shall include the meaning "former Participant".)

14. The second sentence of Section 10.5 is amended to read as follows:

The Participant's assumed pension is the monthly pension the Participant would have received under the Plan if his employment had terminated just before his death and he had lived to begin receiving his pension under the joint and survivor form of payment described in Section 8.2 on the first day of the calendar month next following his death, with his surviving spouse (that is, the person to whom he was married on the date of his death) designated as his joint annuitant.

15. The following new sentence is added at

the end of Section 14.3(g):

The provisions of this Section 14.3 requiring Participants' interest to become nonforfeitable upon termination or partial termination of the Plan are subject to the provisions of Article XV and provisions of the Plan calling for reduction or cancellation of benefits by reason of death.

I FURTHER CERTIFY that the foregoing vote is still in full force and effect and has not been modified, amended or rescinded.

WITNESS my hand as Secretary and the Seal of the Corporation this /s/ 8th day of /s/ May, 1979.

(Corporate Seal) /s/ R. D. Gunn Secretary

COLEMAN FURNITURE COMPANY

SIXTH AMENDMENT

CERTIFICATE OF VOTE

I. R. D. Gunn HEREBY CERTIFY that I am the duly elected, qualified and acting Secretary of Coleman Furniture Corporation ("the Corporation").

I FURTHER CERTIFY that at a meeting of the Board of Directors of the Corporation held on November 18, 1977, at which meeting a quorum was present and acting throughout, the following vote was unanimously adopted:

VOTED: That the Coleman Furniture Company Pension Plan be amended effective as of December 1, 1976 as follows:

Article X is amended by deleting all of the provisions which follow Section 10.3 in said

Article X and substituting therefor Section 10.4 and 10.5 which shall read as follows:

10.4 Automatic pre-retirement death benefit

If a married participant dies after November 30, 1976, before his actual retirement date, while he is an employee and after he has met the standard for early retirement as set forth in Article V above, his spouse shall be eligible for the spouse's pension described in Section 10.5 below.

10.5 Amount, commencement date and form of pre-retirement death

benefit

The monthly amount of the spouse's pension payable to the spouse of a participant whose spouse is eligible therefor shall be equal to 50% of the monthly amount of the participant's assumed pension. The participant's assumed pension is the monthly pension the participant would have received under the Plan if he had retired on the first day of the calendar month in which he dies (with the contingent pensioner option in effect and with provision for continuance after his death of 50% of his pension to

his spouse) and had immediately commenced receiving his pension under such option. Payment of the spouse's pension shall commence to the participant's spouse on the first day of the calendar month next following the month in which the participant dies, if said spouse is living on such day. A monthly payment (equal to the monthly amount of such spouse's pension) shall be payable to said spouse on such day and on the first day of each calendar month beginning after such day and on or before the day

said spouse dies.

I FURTHER CERTIFY that the foregoing vote is still in full force and effect and has not been modified, amended and rescinded.

WITNESS my hand as Secretary and the Seal of the Corporation this day of December 8, 1977.

/s/ R. D. Gunn Secretary

(Corporate Seal)

COLEMAN FURNITURE COMPANY

FIFTH AMENDMENT

CERTIFICATE OF VOTE

I, /s/ R. D. Gunn HEREBY CERTIFY that I am the duly elected, qualified and acting Secretary of Coleman Furniture Corporation ("the Corporation").

I FURTHER CERTIFY that at a meeting of the Board of Directors of the Corporation held on /s/ 11-18-77 1977; at which meeting a quorum was present and acting throughout, the following vote was unanimously adopted:

VOTED: That the Coleman Furniture Company Pension Plan be amended effective as of December 1, 1976 as follows:

The language of Section 2.4 is deleted in its entirety and the following language is substituted therefor:

2.4 "Annual Compensation" of an Employee means all amounts paid by the Company to an Employee for the services rendered by such Employer to the Company as reportable to the Internal Revenue Service on its Form W-2 (or any replacing form).

I FURTHER CERTIFY that the foregoing vote is still in full force and effect and has not been modified, amended and rescinded.

WITNESS my hand as Secretary and the Seal of the Corporation this day of /s/ 11-18, 1977.

/s/ R. D. Gunn Secretary

(Corporate Seal)

COLEMAN FURNITURE CORPORATION

PENSION PLAN

Effective Date

December 1, 1963

As Amended and Restated

by the Fourth Amendment

Effective December 1, 1976

(Table of Contents Omitted in Printing)

ARTICLE I

ESTABLISHMENT OF PLAN

1.1 Designation and purpose of Plan

The Plan shall be known as the "Coleman Furniture Corporation Pension Plan". The purpose of the Plan is to provide retirement benefits for eligible Employees of the Company and their beneficiaries.

1.2 Effective date of Plan

The effective date of the Plan is December 1, 1963. In order to comply with ERISA, the Plan was amended and restated in its entirety by the Fourth Amendment, effective December 1, 1976.

1.3 Limitation on applicability of Plan

Except as may specifically be provided elsewhere herein, this instrument shall not apply to any former Employee whose active employment with the

Company ceased prior to December 1, 1963 and who is not subsequently reemployed. Furthermore, changes made by the Third Amendment shall not apply to any former Employee whose employment with the company terminated prior to December 1, 1976 and who is not subsequently reemployed.

ARTICLE II

DEFINITIONS

(In Alphabetical Order)

Unless otherwise plainly required by context, the following words and phrases when used herein shall have the following meanings:

2.1 "Accrued Benefit" of a Participant means as of any date of reference (the date his Accrued Benefit is to be computed), a monthly pension payable in the normal form of pension payment, in an amount determined in accordance

with the normal retirement benefit formula described in Section 6.1 and based upon his Final Average Annual Compensation, Primary Social Security Benefit and Benefit Accrual Service as of the date of reference. It is provided, however, that such Accrued Benefit shall not exceed the greater of:

(a) $1.25 multiplied by the total amount of his Benefit Accrual Service as the date of reference, not to exceed 20 years;

(b) The monthly pension to which he would be entitled commencing at his normal retirement date determined under the normal retirement benefit formula (based upon his Final Average Annual Compensation and Primary

Social Security Benefit as of the date of reference, but based upon the total amount of Benefit Accrual Service which he would have at his normal retirement date if he should continue to accrue Benefit Accrual Service from the date of reference to his normal retirement date) multiplied by a fraction, the numerator of which is the total amount of his Benefit Accrual Service at the date of reference and the denominator of which is the total amount of Benefit Accrual Service which he would have at his normal retirement date if he should continue to accrue Benefit Accrual Service from the date of reference to his normal retirement date.

2.2 "Actuarial Equivalent" of a benefit means another benefit, differing in time, period or manner of payment, of equivalent value when computed on the basis of consistently applied reasonable actuarial methods, factors and assumptions chosen by a qualified actuary and approved by the Committee. Such methods, factors and assumptions need not be the same as those used in actuarial valuations of the Plan.

2.3 "Affiliated Company" means (i) any trade or business (other than the Company) which, as determined under regulations of the Secretary of the Treasury, is under common control with the Company, or (ii) any corporation (other than the Company) which is included in a controlled group of corporations (within the meaning of Section 1563 of the Internal Revenue

Code of 1954 without regard to Section 1563(a)(4) and Section 1563(e)(3)(C) of such Code) in which the Company is also included.

2.4 "Annual Compensation" of an Employee means the basic annual rate of compensation paid to such Employee by the Company for services rendered by such Employee to the Company. For all purposes hereunder, the basic annual rate of compensation attributable to any twelve month period shall be the basic annual rate of compensation in effect on the December 1 falling within such period. In the case of an Employee who is paid by the Company on an hourly basis, his basic annual rate of compensation shall be his basic hourly rate multiplied by the maximum number of hours per year for which straight time is paid as determined

under the Fair Labor Standards Act, as amended from time to time.

2.5 "Benefit Accrual Service" of an Employee means the Benefit Accrual Service as provided in Section 4.1.

2.6 "Committee" means the person or persons appointed by the Company to assist in the administration of the Plan pursuant to Section 12.1.

2.7 "Company" means Coleman Furniture Corporation and any successor thereto.

2.8 "Eligibility Service" of an Employee means the Eligibility Service as provided in Section 3.4.

2.9 "Eligible Employee" means an Employee (i) whose employment is not subject to the terms of a collective bargaining agreement, or (ii) who is in a class of Employees whose employment is subject to the terms of a collective bargaining agreement and the terms of

such agreement (or any collateral written or oral agreement) specifically provide for inclusion in this Plan of Employees in such class.

2.10 "Employee" means any person who is employed by the Company.

2.11 "Employment Commencement Date" of an Employee means the date on which he first performs an Hour of Service, provided, however, that if an Employee sustains a Substantial Break in Service, his Employment Commencement Date shall be the first day following such Substantial Break in Service on which he performs an Hour of Service.

2.12 "Entry Date" means December 1, 1976 and the first day of each month thereafter.

2.13 "ERISA" means the Employee Retirement Income Security Act of 1974 as amended from time to time and any regulations

issued pursuant thereto as such Act affects this Plan.

2.14 "Final Average Annual Compensation" of an Employee as of any date (his computation date) means his Annual Compensation averaged over the most recent 120 months of his participation in the Plan before his normal retirement date and through his computation date. However, if his Final Average Annual Compensation is to be determined as of any computation date when he has completed fewer than 120 months of participation in the Plan before his normal retirement date, his Final Average Annual Compensation shall be his Annual Compensation averaged over the most recent 120 months (or if shorter, the entire period) of his employment with the Company before his normal

retirement date and through his computation date (whether or not such employment is renderd as a Participant). It is further provided that in determining his Final Average Annual Compensation, his participation, employment with the Company and Annual Compensation before a Substantial Break in Service shall be disregarded.

2.15 "Hour of Service" of an Employee means an Hour of Service as provided in Section 4.3.

2.16 "One-Year Break in Service" of an Employee means any Plan Year during which he is not credited with more than 500 Hours of Service.

2.17 "Participant" means ay Employee who is or becomes a Participant in the Plan as provided in Article III.

2.18 "Plan" means the Coleman Furniture

Corporation Pension Plan as evidenced by this instrument, as amended from time to time.

2.19 "Plan Year" means the 12-month period which begins on December 1st of each year.

2.20 "Primary Social Security Benefit" of a Participant as of any date (computation date) means his monthly primary insurance amount under the Social Security law (the Federal Social Security Act, as amended, and regulations, rulings and judicial decisions thereunder) in effect on such date (including amendments to the Social Security Act made effective retroactively for not more than six months) computed on the basis of the following assumptions:

(a) That the first month for which he is entitled to old-age

insurance benefits under such law is the later of the month in which the computation date occurs and the month in which his 65th birthday occurs;

(b) That he will have no compensation for the purposes of such law on or after the later of such months;

(c) That, in a case where the computation date occurs in an earlier calendar year than the calendar year in which his 65th birthday occurs, his compensation for the purposes of such law during the calendar year in which the computation date occurs and during each subsequent calendar year, if any, prior to the calendar year in which his 65th birthday

occurs will be the same as his current Annual Compensation on the computation date;

(d) That the methods and factors (the taxable wage base, level of benefits and any other factors) prescribed by the Social Security law for computing a primary insurance amount for the calendar month immediately preceding the computation date continue to be applicable to the computation of a primary insurance amount for all future months.

There shall be no change in the Primary Social Security Benefit of a Participant after the termination of his employment with the Company, except as provided in Section 6.4 and except as otherwise specifically provided elsewhere in the

Plan.

2.21 "Substantial Break in Service" An Employee shall incur a Substantial Break in Service if, at the time when he incurs one or more One-Year Breaks in Service, he has no vested interest under the Plan (pursuant to Section 7.1) and the number of consecutive One-Year Breaks in Service which occur during such break equals or exceeds the aggregate number of his years of Eligibility Service, not counting in such aggregate number any year of Eligibility Service previously excluded in respect of an earlier Substantial Break in Service.

2.22 "Trust Agreement" means the Trust Agreement entered into with the Trustee in accordance with Article XIII.

2.23 "Trustee" means the party or parties,

individual or corporate, named in the Trust Agreement as Trustee and any duly appointed additional or successor Trustee or Trustees acting thereunder.

2.24 "Trust Fund" means the Fund established pursuant to the Trust Agreement and shall include all the assets and other property held by the Trustee under the Trust Agreement.

2.25 "Vesting Service" of an Employee means the Vesting Service as provided in Section 4.2

2.26 Wherever appropriate, words used in the Plan in the singular may mean the plural, the plural may mean the singular, and the masculine may mean the feminine.

ARTICLE III

PARTICIPATION IN THE PLAN

3.1 Date of participation

Each Employee on December 1, 1976 who

was a Participant under the Plan on November 30, 1976 shall continue to be a Participant in accordance with the provisions of the Plan as it is herein amended and restated. Each other Employee on December 1, 1976 and each person who thereafter becomes an Employee shall become a Participant in the Plan on the earliest Entry Date on which he is an Eligible Employee after having completed one year of Eligibility Service and attained age 25.

3.2 Rentry into the Plan

An Employee who terminates his participation in the Plan for any reason (pursuant to Section 3.3) shall resume his participation on the earliest Entry Date subsequent to such termination on which he is again an Eligible Employee, provided, however,

that if he sustains a Substantial Break in Service following such termination of participation, he shall not resume his participation in the Plan until the earliest Entry Date subsequent to such termination on which he is again an Eligible Employee and has completed one year of Eligibility Service following such Break in his service.

3.3 Terminatin of participation

A Participant shall terminate his participation in the Plan when he ceases to be an Eligible Employee due to his termination of employment with the Company (because of his death, retirement or any other reason) or due to a transfer in his position with the Company or a change in his job classification with the Company.

3.4 Eligibility Service

An Employee shall be credited with one (1) year of Eligibility Service for each eligibility computation period during which he completes 1000 or more Hours of Service, provided, however, that if he incurs a Substantial Break in Service, any year of Eligibility Service before such Substantial Break in Service shall be disregarded.

3.5 Eligibility computation period defined

The "eligibility computation period" of an Employee means the 12-consecutive-month period beginning on his Employment Commencement Date, subject to the following special rules:

(a) If the Employee fails to complete a year of Eligibility Service during the first such period, his eligibility computation period shall switch

to the Plan Yer which includes the first anniversary of his Employment Commencement Date and, if necessary, each succeeding Plan Year until he completes a year of Eligibility Service.

(b) After the Employee completes a year of Eligibility Service, his eligibility computation period shall shift to the Plan Year, beginning with the Plan Year which includes the date on which he completes such year of Eligibility Service.

3.6 Requirement that participant furnish relevant information

Anything herein to the contrary notwithstanding, each Participant must, as a condition of participation, execute such instruments as may be

required of him, produce such evidence of age as may reasonably be required of him, and answer truthfully and completely, without mental reservation or concealment, any question or request for information relating to such participant's benefits hereunder.

ARTICLE IV

BENEFIT ACCRUAL SERVICE; VESTING SERVICE; HOUR OF SERVICE

4.1. Benefit Accrual Service

An Employee shall be credited with one (1) year of Benefit Accrual Service for each Plan Year during which he completes 1000 or more Hours of Service subject to the following special rules:

(a) The amount of Benefit Accrual Service credited to an Employee for the period before December 1, 1976 shall be equal to the amount of service credited to

him for such period for purposes of benefit accrual under the Plan as determined by the applicable provisions of the Plan in effect from time to time before such date;

(b) In the case of an Employee who incurs a Substantial Break in Service, any year of Benefit Accrual Service before such Substantial Break in Service shall be disregarded;

(c) In the case of an Employee who becomes a Participant (or resumes his Participation) on a date other than the first day of a Plan Year, and who completes less than 1000 Hours of Service during such Plan Year, he shall receive credit for a partial year of Benefit Accrual Service

for such Plan Year, provided the number of Hours of Service completed by him during such Plan Year, when annualized, equal at least 1000 hours. The amount of such partial year of Benefit Accrual Service shall be determined by a fraction, the numerator of which shall be the number of days that he was a Participant during such Plan Year and the denominator of which shall be the number of days in such Plan Year.

(d) In the case of an Employee who first becomes a Participant in the Plan on December 1, 1976 and who, on such date, does not satisfy the eligibility requirements of the Plan as in effect on November 30, 1976, any

Benefit Accrual Service before December 1, 1976 shall be disregarded. (For example, an Employee who was a part-time Employee on November 30, 1976, but how, nevertheless, entered the plan on December 1, 1976 pursuant to Section 3.1, shall not be credited with any Benefit Accrual Service for his employment before his entry into the Plan);

(e) Any year of Benefit Accrual Service which begins after the Employees normal retirement date shall be disregarded.

4.2 <u>Vesting Service</u>

An Employee shall be credited with one (1) year of Vesting Service for each Plan Year during which he completes 1000 or more Hours of Service subject

to the following special rules:

(a) Any year of Vesting Service before December 1, 1976 shall be disregarded if such year of Vesting Service would have been disregarded under the rules of the Plan with regard to breaks in service and length of service in effect from time to time before such date;

(b) In the case of an Employee who incurs a Substantial Break in Service, any year of Vesting Service before such Substantial Break in Service shall be disregarded;

(c) Any year of Vesting Service at the close of which the Employee has not attained age 22 shall be disregarded;

(d) If an Employee's first year of

Eligibility Service overlaps two Plan Years, neither of which is a year of Vesting Service, then such year of Eligibility Service shall also be credited to the Employee as a year of Vesting Service, unless such year of Vesting Service would be disregarded under paragraphs (a), (b) and (c) above.

4.3 Hour of Service

(a) For the purpose of determining Eligibility Service, Vesting Service, the Employment Commencement Date of an Employee, and whether a Plan Year is a One-Year Break in Service, an Hour of Service for an Employee means:

(i) each hour for which the Employee is directly or

indirectly paid, or entitled to payment, by the Company or an Affiliated Company for the performance of duties, each such hour to be credited to the Employee for the Plan Year in which the duties were performed; and

(ii) each hour, not included under subparagraph (i) above, for which back pay, irrespective of mitigation of damages, has been either awarded to the Employee or agreed to by the Company or an Affiliated Company, each such hour to be credited to the Employee for the Plan Year to which the award or agreement pertains; and

(iii) each hour for which the Employee is directly or indirectly paid, or entitled to payment, by the Company or an Affiliated Company for reasons (such as vacation, sickness or disability) other than for the performance of duties, each such hour to be credited to the Employee for the Plan Year during which either payment is actually made or amounts payable come due. The number of such hours shall be determined by dividing the payments received or due by the lesser of (A) the Employee's most recent hourly rate of compensation

for the performance of duties and (B) the Employee's average hourly rate of compensation for the performance of duties for the most recent Plan Year in which he completed more than 500 Hours of Service, and

(iv) each non-compensated hour during which the Employee is on a period of absence from active employment with the Company or an Affiliated Company for (A) military service when required by law, provided he returns to work with his employer within 90 days after release from military duty, or any longer period

during which his reemployment rights are protected by law, (B) temporary layoff, for a period not to exceed 6 months, provided he returns to work when recalled by his employer, and (C) leave of absence for sickness, accident, disability or any other reason for the period authorized by his employer, provided he returns to work at the expiration of such period, each such hour to be credited to him on the basis of the number of hours (not to exceed 40 for a full week and a pro-rate portion of 40 for a partial week) that he would

normally have worked during such period of absence.

(b) For the purpose of determining Benefit Accrual Service, an Hour of Service for an Employee means an hour determined in accordance with Paragraph (a) above, with the following exceptions:

(i) any hour attributable to employment with an Affiliated Company shall be disregarded;

(ii) any hour attributable to a period of absence from active employment with the Company during which he does not receive his regular compensation shall be disregarded.

ARTICLE V

RETIREMENT DATES

5.1 Normal retirement date

A Participant may elect to retire ~~(or be retired by the Company)~~ [the preceding "(or be retired by the Company)" has been manually crossed out] on his normal retirement date, which shall be the first day of the month coincident with or next following the later of his 65th birthday and the tenth anniversary of the date he commenced his participation in the Plan. A Participant who retires on his normal retirement date shall receive a monthly pension payable in the normal form of pension payment and commencing on his normal retirement date in the amount specified in Section 6.1.

5.2 Deferred retirement date

~~With the consent of the Company~~, [the preceding "With the consent of the

Company" has been manually crossed out] a Participant may remain in the active employment of the Company after his normal retirement date and may elect to retire (or be retired by the Company) on the first day of any month after his normal retirement date. His date of actual retirement under this Section 5.2 shall be known as his deferred retirement date. A Participant who retires after his normal retirement date shall receive a monthly pension payable in the normal form of pension payment and commencing on his deferred retirement date in an amount specified in Section 6.2.

5.3 Early retirement date

A Participant who has completed at least thirty (30) years of Benefit Accrual Service may elect to retire on

an early retirement date which may be the first day of any subsequent month prior to his normal retirement date. A Participant who retires on an early retirement date shall receive a pension payable in the normal form of pension payment and commencing, at his option, on his early retirement date or the first day of any subsequent month, but in no event later than his normal retirement date, in the amount specified in Section 6.3.

5.4 Retirement defined

As used in this Plan, "retirement" means the cessation of active employment with the Company on a normal, or early retirement date of an Employee who is eligible to retire on such date in accordance with the provisions of the Plan, and no benefits shall become payable to a

Participant prior to his cessation of employment with the Company.

5.5 Non-duplication provision

An early or deferred retirement benefit shall be paid in lieu of, not in addition to, a normal retirement benefit.

ARTICLE VI

AMOUNT OF RETIREMENT BENEFITS

6.1 Normal retirement benefit

Subject to the provisions of Section 6.5, the amount of monthly pension payable to a Participant who retires on his normal retirement date pursuant to Section 5.1 shall be equal to the greater of:

(a) One-twelfth of 50 percent of his Final Average Annual Compensation, less 83 1/3 percent of his Primary Social Security Benefit, multiplied by

a fraction (not to exceed one) the numerator of which shall be the total number of years of his Benefit Accrual Service (recognizing a fraction of a year) and the denominator of which shall be 20; and

(b) The lesser of (i) $25.00 and (ii) $1.25 multiplied by the total number of years of his Benefit Accrual Service (recognizing a fraction of a year).

It should be pointed out, however, that if the provisions of Section 8.2 are applicable (normal form of payment for certain married Participants), the amount of monthly pension payable hereunder shall be the Actuarial Equivalent of the monthly amount of pension determined above.

6.2 Deferred retirement benefit

Subject to the provisions of Section 6.5, the amount of monthly pension payable to a Participant who retires on his deferred retirement date pursuant to Section 5.2 shall be equal to the greater of:

(a) One-twelfth of 50 percent of his Final Average Annual Compensation increased to reflect the later commencement of his pension payments, less 83 1/3 percent of his Primary Social Security Benefit (determined as of his actual retirement date, notwithstanding the fact that his Final Average Annual Compensation is to be determined as of his normal retirement date) multiplied by a fraction, not to exceed one, the

numerator of which shall be the total number of years of his Benefit Accrual Service (recognizing a fraction of a year) and the denominator of which shall be 20; and

(b) The lesser of (i) $25.00, actuarially increased to reflect the later commencement of his pension payments and (ii) $1.25 multiplied by the total number of his years of Benefit Accrual Service (recognizing a fraction of a year), actuarially increased to reflect the later commencement of his pension payments.

It should be pointed out, however, that if the provisions of Section 8.2 are applicable (normal form of payment for certain married Participants), the

amount of monthly pension payable hereunder shall be the Actuarial Equivalent of the monthly amount of pension determined above.

6.3 Early retirement benefit

The monthly amount of pension payable to a Participant who retires on an early retirement date pursuant to Section 5.3, commencing on his normal retirement date, shall be his Accrued Benefit computed as of his early retirement date. If such early retirement pension commences before his normal retirement date, the monthly amount of such pension shall be the Actuarial Equivalent of his Accrued Benefit computed as of his early retirement date.

6.4 Provisions regarding multiple periods of employment

If the employment with the Company of

a Participant or former Participant terminates and if he is subsequently rehired and again becomes a Participant, appropriate actuarial adjustment shall be made in his benefit under the Plan to reflect any payments made under the Plan, (in a lump sum or otherwise) prior to his rehire, but the amount of his benefit shall not be less than if he had not been rehired. Furthermore, benefits otherwise payable to him during the period of his reemployment shall be deferred or suspended during such period, but if he had been receiving his pension under the joint and survivor option when he was rehired, his joint annuitant's right under such option to a continuing pension after his death shall not be impaired by reason of such deferral or suspension.

6.5 Maximum benefit allowed under the Plan

(a) Except as otherwise provided in paragraphs (b), (c), (d), (e), (f) and (g) of this Section 6.5, the annual amount of benefit of a Participant, (or former Participant) shall not exceed the lesser of:

(i) 75,000, or

(ii) 100% of his average annual compensation for the 3 consecutive calendar years as a Participant during which he received the greatest aggregate compensation (but, if he does not have 3 consecutive calendar years as a Participant, then such average shall be taken over his 3 consecutive calendar

years as an Employee during which he received the greatest aggregate compensation, and if he does not have 3 consecutive calendar years as an Employee, then such average shall be taken over his entire employment).

(b) If the benefit paid to a Participant is not in the form of a straight life annuity and if payment of such benefit begins on or after his 55th birthday, the maximum benefit (the maximum annual amount determined under paragraph (a) of this section and adjusted under paragraph (g) of this section) shall be actuarially adjusted to that annual amount

which would be the Actuarial Equivalent of the maximum benefit payable in the form of a straight life annuity beginning at the same time as the Participant's benefit. It is provided, however, that, if the benefit is paid in the form of a joint and survivor annuity (where the Participant's spouse is designated as his joint annuitant and where the designated percentage of the Participant's pension to be continued after the Participant's death is not less than 50%), the benefit shall be treated as if it were paid in the form of a straight life annuity for all purposes of this paragraph (b) and of paragraph

(c) of this section, which means that no adjustment in the maximum benefit need be made under this paragraph (b) and the adjustment in the maximum benefit required under paragraph (c) need reflect only commencement of payment before the Participant's 55th birthday.

(c) If payment of a benefit to a Participant begins before his 55th birthday, the maximum benefit shall be actuarially adjusted to that annual amount which, if paid in the same form and beginning at the same time as the Participant's benefit, would be the Actuarial Equivalent of the maximum benefit payable in the normal form of pension payment

beginning on the first day of the month coincident with or next following the Participant's 55th birthday.

(d) The limitations of paragraphs (a) and (b) of this section shall be deemed not to be exceeded if the annual amount of the Participant's benefit does not exceed $10,000 and if the Company or an Affiliated Company has not at any time maintained a defined contribution plan in which the Participant participated. The phrase "Affiliated Company" shall have the same meaning in this paragraph (d) as in paragraph (f) of this section.

(e) If the Participant has completed less than 10 years of Vesting

Service, the maximum amount determined under the foregoing provisions of this section shall be reduced by 10 percent for each year that the total number of his years of Vesting Service is less than 10.

(f) If the Participant has participated in any other pension plan maintained by the Company or an Affiliated Company (as defined in Section 2.3, but substituting the phrase "more than 50 percent" for the phrase "at least 80 percent" each place it appears in Section 1563(a)(1) of the 1954 Internal Revenue Code, for the purpose of determining what is a controlled group of corporations within the meaning of said Section

1563(a)(1)), the maximum amount as determined under the foregoing provisions of this section shall be reduced by any pension benefit to which he is entitled under such other plan.

(g) The $75,000 limit in paragraph (a)(i) above and, in the case of a Participant who is separated from service, the average annual compensation in paragraph (a)(ii) above shall be increased to reflect cost of living increases, as permitted under regulations issued by the Secretary of the Treasury.

ARTICLE VII

TERMINATION OF EMPLOYMENT AND VESTED RIGHTS

7.1 Vesting.

A Participant or former Participant

shall have a fully vested interest in his Accrued Benefit at all times after he (i) has reached his normal retirement date and is then or thereafter in the service of the Company or an Affiliated Company, or (ii) has completed 10 years of Vesting Service.

7.2 Special minimum vesting for Participants on November 30, 1976

An Employee who was a Participant in the Plan on November 30, 1976, shall not be vested in his Accrued Benefit at any time to a lesser extent than he would have been if the Plan had continued in effect after such date without amendment.

7.3 Determination of Accrued Benefit

If the participation of a Participant is terminated hereunder because his employment with the Company is

terminated, his Accrued Benefit is determined as of the date his participation and employment are terminated. (For provisions relating to multiple periods of employment, see Section 6.4.) If the participation of a Participant is terminated hereunder because he ceases to be an Eligible Employee due to transfer or change in employment status, his Accrued Benefit is determined as of the date his participation is terminated (or as of the date his last period of participation is terminated, if he has more than one period of participation before the termination of his employment).

7.4 Payment of Vested Interest

A Participant who terminates his participation in the Plan before he reaches his normal retirement date

(other than by death or early retirement) and who has a vested interest in his Accrued Benefit when his employment terminates (or who thereafter acquires a vested interest in his Accrued Benefit) shall be entitled to receive his vested interest in his Accrued Benefit as a monthly pension commencing on the first day of the month coincident with or next following his normal retirement date, or if he is in the employment of the Company on such date, the date on which his employment with the Company thereafter terminates. Such pension shall be payable in the normal form of payment, or in such optional form as he may elect, in accordance with the applicable provisions hereof. However, if he has completed at least

thirty (30) years of Benefit Accrual Service, he may elect to have the payment of such pension commence on the first day of any month before his normal retirement date (but not prior to the date of his termination of employment with the Company). If such election is made, the amount of such pension shall be the Actuarial Equivalent of his Accrued Benefit.

ARTICLE VIII

NORMAL FORM OF RETIREMENT BENEFITS

8.1 Normal form of pension

Except as otherwise provided in Section 8.2, the normal form of pension payable under the Plan to a Participant shall be a monthly pension payable to the Participant during his lifetime, the first payment to be due on the date of commencement of his benefits under the Plan, and the last

payment to be due on the first day of the calendar month in which his death occurs.

8.2 Normal form of pension for certain married Participants

The normal form of pension payable under the Plan to a Participant who is married on the date payment of his benefits under the Plan commence and who has not made an election under Section 8.3 shall be the joint and survivor form of payment with the person to whom the Participant was married on such date designated as his joint annuitant. Under this form of payment, the Participant shall receive a monthly pension beginning on the date of commencement of his benefits under the Plan and payable during his lifetime, the amount of such pension to be the Actuarial Equivalent of the

pension payable in the normal form described in Section 8.1. If the Participant predeceases his joint annuitant, then fifty percent (50%) of the Participant's reduced pension shall be paid to the joint annuitant during such person's remaining lifetime, the first such payment to commence on the first day of the month next following the Participant's death, the last such payment to be paid on the first day of the calendar month in which the joint annuitant dies. However, if the joint annuitant to whom a survivor annuity is payable under this Section 8.2 predeceases the Participant, the Participant shall continue to receive his actuarially reduced pension during his remaining lifetime, the last such payment to be due on the first day of the month in

which he dies. Notwithstanding the foregoing provisions of this Section 8.2, if a married Participant remains in the employment of the Company after his normal retirement date and subsequently dies before the date payment of his benefits under the Plan have commenced, without having made an election under Section 8.3 prior to his death, his surviving spouse shall be entitled to receive a monthly pension payable during such spouse's remaining lifetime, such pension to be computed as if the Participant had retired on the first day of the month in which he dies with the joint and survivor annuity form of payment described in this Sectin 8.2 in effect and with his surviving spouse designated as his joint annuitant.

8.3 <u>Election not to take the joint and</u>

survivor annuity

A married Participant may elect not to take the joint and survivor annuity described in Section 8.2 by delivering to the Committee within 90 days before the date payment of his benefits under the Plan commence (the election period) his written election to have his benefits paid in the normal form of payment described in Section 8.1 or in an optional form of payment described in Article IX. Before he elects such normal form of pension payment, the Committee shall furnish him with the information described in Section 8.4. The Participant may revoke any election made under this Section 8.3 by filing a written revocation with the Committee any time prior to the date payment of his benefits under the Plan commences and

such revocation shall be effective upon receipt by the Committee. No such revocation shall prevent the Participant from making a subsequent election not to take the joint and survivor annuity under the conditions described above in this Section 8.3.

8.4 Information to be furnished to the Participant

Within a reasonable time after the first day of the election period described in Section 8.3, the Committee shall furnish the Participant a written notification, in non technical terms, of:

(a) the availability of the election described in Section 8.3, and

(b) the availability, upon his request, of the terms and conditions of the joint and survivor annuity described in

Section 8.2 and the financial effect upon his pension (in terms of dollars per pension payment) of making an election not to take such annuity.

8.4 Applicability to former Participants

For purposes of this Article VIII, the term "Participant" shall include a former Participant.

ARTICLE IX

OPTIONAL FORMS OF BENEFIT

9.1 Election of optional forms of payment

In lieu of receiving his pension in the normal form of pension payment described in Article VIII, a Participant may elect to receive his pension in one of the optional forms of payment described hereinafter. Payment in accordance with any such optional form shall commence on a date not later than his normal retirement

date or his date of actual retirement (or termination of employment with the Company). The amount of pension payable to the Participant in accordance with any such optional form shall be the Actuarial Equivalent of the pension payable in the normal form described in Section 8.1.

9.2 Joint and survivor option

Under this option, the Participant designates a person as his joint annuitant and also designates a percentage of the Participant's pension (100% or a smaller percentage) to be paid to such joint annuitant after the Participant's death. The first such payment to the joint annuitant shall commence on the first day of the month next following the Participant's death, the last such payment to be paid on the first day of

the month in which the joint annuitant dies. (It should be noted that the normal form of pension payable under the Plan to a Participant who is married on the date his benefits under the Plan commence and who has not made an election under Section 8.3 is a joint and survivor form of payment with 50% of his pension to his spouse.) The amount of each such payment to the joint annuitant shall be the designated percentage of the Participant's pension, or, if the Participant dies before his pension has commenced (but on or after the effective date of such option), the amount of each such payment to the joint annuitant shall be designated percentage of the monthly amount of pension which the Participant would have received if he had commenced

receiving his pension under this option on the first day of the month in which his death occurred.

9.3 <u>Ten year certain and life option</u>

Under this option, if the Participant dies before receiving one hundred and twenty (120) monthly pension payments, his pension payments shall be continued after his death to the beneficiary (named by the Participant pursuant to Section 10.2) until the total number of monthly pension payments made to the Participant and his beneficiary equals 120 payments. The amount of each such payment to such beneficiary shall be the same as the monthly amount of pension which has been payable to the Participant before his death, under this option, or, if the Participant dies before his pension has commenced (but on or after

the effective date of such option), the amount of such payment to the beneficiary shall be the same as the monthly amount of pension which would have been payable to the Participant if he had commenced receiving his pension under this option on the first day of the month in which his death occurred.

9.4 Other options

Subject to the consent of the Company and the Trustee, a Participant may receive an Actuarial Equivalent of his pension in such other manner as he may elect, including a lump sum. An election under this section shall not, however, alter the terms and conditions of the Plan regarding a Participant's rights prior to his normal or early retirement date, nor shall any such election alter the

provisions of the Plan regarding permissible retirement dates.

9.5 Option effective date and other conditions

The election of an option by a Participant under the foregoing provisions of this article shall be subject to the following conditions:

(a) The Participant's election must be in writing and filed with the Committee, in such form as it shall prescribe. Such option shall become effective on the earlier of his normal and actual retirement date, or, if his participation terminates for a reason other than his retirement or death, the earlier of his normal retirement date and the date his pension payments commence (but no option shall

become effective prior to the date the option is elected.) It is provided, however, that an option elected under Section 9.4 shall become effective on the option effective date specified by the terms of the option. Notwithstanding the foregoing provisions of this paragraph (a), if an election is not filed at least one (1) year before the effective date of such election (as determined under the above provisions), such option shall not become effective unless evidence of his good health satisfactory to the Committee is furnished by the Participant to the Committee.

(b) An election may be revoked before the effective date of the

option upon the written request filed with the Committee by the Participant. An election may not be revoked after the effective date of the option.

(c) If a Participant for whom an option is in effect predeceases his joint annuitant or beneficiary (hereinafter referred to in this section as his "provisional payee") and the Participant's death occurs before the effective date of the option, the election shall cease to be effective and no benefit shall be paid to his provisional payee.

(d) If a Participant for whom an option is in effect predeceases his provisional payee and such death occurs on or after the

effective date of the option, his provisional payee shall be entitled to pension payments in accordance with the provisions of such option.

(e) If the provisional payee designated by the Participant under the option predeceases the Participant and such death occurs before the effective date of the option, such option shall be automatically revoked.

(f) If the provisional payee designated by the Participant under such option predeceases the Participant and if such death occurs on or after the effective date of the option, the Participant shall receive or continue to receive his actuarially reduced pension

payment in accordance with the provisions of such option.

In no event shall the provisions of this Section 9.5 apply to the joint and survivor normal form of payment set forth in Section 8.2.

9.6 Limitations on options

Notwithstanding the foregoing provisions of this Article IX to the contrary, an option elected by a Participant must satisfy the requirements of either (a) or (b) below.

(a) The actuarial value (determined as of his option effective date) of the benefits payable to him under the option during his lifetime must exceed one half of the actuarial value (determined as of his option effective date) of all benefits payable under

the option.

(b) The option provides for periodic payments beginning during the lifetime of the Participant or on a date which, considered when the option is elected, might occur during his lifetime (for example, his normal retirement date) and provides further that each payment during the Participant's lifetime will be made to the Participant, that the amount of each payment (if any) after his death will be no greater than the amount of each payment during his lifetime (except that adjustment for investment experience or in accordance with a generally recognized cost-of-living index may be provided) and payment

will not extend beyond the end of the longest of the following periods:

(i) the life of the Participant;

(ii) the lives of the Participant and his spouse;

(iii) the life expectancy of the Participant;

(iv) the joint and last survivor expectancy of the Participant and his spouse.

A period of life expectancy may begin on the Participant's option effective date, the date payment of benefits commences, or the date the participant's employment terminates. Such life expectancy shall be determined on the basis of facts existing on the date such period begins and shall not exceed the period

calculated by the use of the expected return multiples contained in Section 1.72 - 9 of the Income Tax Regulations or any successor section.

9.7 Applicability to former Participants

As used in this article, the term "Participant" shall be deemed to include former Participants.

9.8 Small pensions

If the monthly amount of any pension hereunder is less than ten dollars, the Committee may, in its sole discretion, direct the Trustee to pay such pension quarterly, semi-annually, annually or in a lump sum, in an amount which is the Actuarial Equivalent of such pension.

ARTICLE X

DEATH BENEFITS

10.1 Death benefits

Except as may be provided under a form

of pension payment or as may be provided under the pre-retirement death benefit option described in Section 10.4, there shall be no death benefits payable under the Plan.

10.2 Beneficiary

A Participant electing an optional from (sic) of benefit under which benefits may become payable after his death in a lump sum or for a period determined without reference to the duration of any person's life may designate one or more direct or contingent beneficiaries in writing on forms supplied by the Committee. A Participant or former Participant may change his designation at any time in the same manner. Any portion of a Participant's or former Participant's death benefit which is not disposed of under a designation of beneficiary for

any reason whatsoever shall be paid to his

(a) spouse,

(b) natural and adopted children and survivors thereof, in equal shares,

(c) parents and survivor thereof, in equal shares,

(d) brothers and sisters and survivors thereof, in equal shares, or

(e) executors or administrators.

The benefit shall be paid to the first named person surviving the Participant, or class with one or more persons surviving the Participant, in the order named, to the exclusion of all subsequently named persons or classes. "Beneficiary" means the person or persons designated by the Participant or by the terms of this

section to receive death benefits, but the provisions of this section shall in no event apply to any amounts payable to a contingent pensioner or other person entitled to payments for life after the death of the Participant under any optional form of benefit.

10.3 Optional methods of settlement of death benefits

Subject to the consent of the Committee, any person (including a beneficiary or contingent pensioner) entitled to receive a benefit after the death of a Participant or former Participant may elect to receive an Actuarial Equivalent of such benefit in any manner other than the manner in which such benefit would otherwise be payable, unless such participant or former participant specifically shall

have provided otherwise. However, in the event that a death benefit described in Section 10.2 must be disposed of other than under a designation of beneficiary executed by the Participant or former Participant, payment of such Actuarial Equivalent may be made on the Committee's initiative with or without the consent of the beneficiary. In this event, payments shall not be subject to any restrictions on mode of settlement previously imposed by the Participant or former Participant. Any action taken pursuant to the provisions of this section shall be subject to the consent of the Trustee.

10.4 Election of pre-retirement death benefit option by certain married Participants. A married Participant may elect, during the election period

described in Section 10.6, the pre-retirement death benefit option which provides for the payment of a monthly pension payable to his spouse upon his death if he dies prior to his normal retirement date while in the employment of the Company after he has satisfied the requirements for early retirement as set forth in Section 5.3, and while such option is in effect.

10.5 Amount, commencement date and form of pre-retirement death benefit

The amount of monthly pension payable to a Participant's surviving spouse under Section 10.4 shall be equal to 50% of the Participant's assumed early retirement pension (that is, the amount of monthly pension the Participant would have received if he had retired and commenced receiving

his pension on the day before the day of his death with the joint and survivor option described in Section 9.2 in effect, and with provision for continuance of 50% of his reduced Pension to his spouse). In computing the Participant's assumed early retirement pension, the reductions called for by Section 10.7 shall be made. Payment of the spouse's pension described in Section 10.4 shall commence to the Participant's spouse on the first day of the month next following the month in which the Participant dies (if said spouse is living on such date) and shall be payable to said spouse on the first day of each following month and shall end on the first day of the month in which said spouse dies.

10.6 Election period of pre-retirement

death benefit and information to be furnished to Participant

The election period during which a married Participant may elect the pre-retirement death benefit option under Section 10.4 is the period beginning one year and 90 days prior to the date on which he as satisfied the service requirement for early retirement as set forth in Section 5.3 and ending on his normal retirement date. The Committee shall, within a reasonable amount of time after the first day of such election period, furnish to the Participant an election form and a written notification, in non-technical terms, of;

(a) The availability of the pre-retirement death benefit option; and

(b) The availability, upon his

request, of a written explanation, in non-technical language, of the terms and conditions of such option and the financial effect upon his estimated pension under the Plan (in terms of dollars per pension payment) of an election of such option or a revocation of such election.

10.7 Effective date of pre-retirement death benefit option

The effective date of the pre-retirement death benefit option election described in Section 10.4 shall be the date designated by the Participant in the election form, but not before the latest of the following dates:

(a) The first anniversary of the date on which he married his

spouse;

(b) The date on which he has completed thirty (30) years of Benefit Accrual Service;

(c) The first anniversary of the date on which he submits the completed election form to the Committee;

However, paragraph (c) above shall not apply if the Participant dies as a result of an accident which occurs after the completed form is returned to the Committee. If the Participant dies before the effective date of an election under Section 10.4, the election will be void and the Participant will be treated as though he had made no election.

10.8 Revocation of pre-retirement death benefit option election

A Participant who has elected the pre-

retirement death benefit option may revoke such election at any time by delivering a written instrument of revocation to the Committee, and such option shall cease to be effective at the end of the day designated by the Participant in the instrument of revocation, but not prior to the date on which he submits such instrument to the Committee. In any event, such option shall cease to be effective on his normal retirement date and shall not be considered to be in effect at any time while the Participant does not have a living spouse. (If the Participant's spouse dies while such option is in effect, and the Participant remarries, such option again becomes effective, unless the Participant revokes it.) No revocation under this Section 10.8

shall prevent the Participant from making a subsequent election under Section 10.4 during the election period described in Section 10.6.

10.9 <u>Pension reduction to reflect cost of pre-retirement death benefit</u>

The amount of pension otherwise payable to or on behalf of a Participant under any provision of the Plan shall be reduced by 1/20 of one percent for each full calendar month that the pre-retirement death benefit option described in Section 10.4 was in effect on his behalf prior to his death and after the calendar month in which the last day before his 60th birthday occurs and 1/50 of one percent for each other full calendar month such option was in effect prior to his death and after the calendar month in-which the last day before his

55th birthday occurs.

ARTICLE XI

CONTRIBUTIONS TO THE TRUST FUND

11.1 Company contributions

All contributions to provide benefits under the Plan shall be made by the Company and no Participant shall be required or permitted to make contributions. The Company's contributions shall be made to the Trust Fund from time to time in amounts actuarially determined to be sufficient to fund the benefits hereunder. The Company, at any time, may reduce, suspend, or discontinue contributions in its sole discretion.

11.2 Application of forfeitures

All forfeitures arising from severance of employment, death, or for any reason shall be applied to reduce Company contributions, and no such

amounts shall in any event be applied to increase the benefits any Employee would otherwise receive under the Plan at any time prior to the termination of the Plan or the complete discontinuance of Company contributions thereunder.

11.3 Erroneous contribution

Notwithstanding any provision of the Plan to the contrary, a contribution made by the Company under the Plan through a mistake of fact may be returned to the Company within one year after such contribution is made.

ARTICLE XII

ADMINISTRATION OF THE PLAN

12.1 Administration

The Company shall, for purposes of ERISA, be the named fiduciary and the administrator of the Plan. A Committee may be appointed by the

Company to assist in the administration of the Plan, however, if such Committee is not appointed or if the Company dissolves the Committee, all powers and duties granted to the Committee by the terms of the Plan shall be exercised by the Company.

12.2 Appointment, removal of Committeeman

The Committee shall consist of at least two persons, but not more than five, and may consist of Participants or Employees or officers of the Company. The Company may remove any Committeeman at any time, with or without cause, by filing written notice of his removal with the Trustee. A Committeeman may resign at any time by filing his written resignation with the Company. A vacancy due to death, removal,

resignation or any other reason shall be filled by the Company. The Company shall notify the Trustee in writing of each Committeeman's appointment.

12.3 Bonding, compensation, expenses

The Committee, and each Committeeman, shall serve without bond or other security and without compensation for services hereunder, except as required by law. All reasonable expenses of the Committee shall be paid out of the Fund except to the extent paid by the Companies, but no Company need pay any such expense.

12.4 Procedure for Committee action

The Committee shall act by agreement of a majority of its members, either by vote at a meeting or in writing without a meeting. In the event of a deadlock or other situation which prevents agreement of a majority of

the Committee, the matter shall be decided by the Company. The Committee, by such action, may authorize one or more Committeemen to execute all instruments or memoranda necessary or appropriate to carry out the actions and decisions of the Committee. The Trustee, upon written notification of such authorization, shall accept and rely upon any such instruments or memoranda until notified in writing that the authorization has been revoked by the Committee. A member of the Committee, who is also a Participant hereunder, shall not vote or act upon any matter relating solely to himself.

12.5 Duties and powers

The Committee shall have all power and authority necessary and appropriate to carry out the provisions of the Plan.

For this purpose, the Committee's powers will include, but will not be limited to, the following authority:

(a) To adopt and enforce such rules and regulations as it deems necessary or proper for the efficient administration of the Plan,

(b) To interpret and apply all terms of the Plan and to correct any defect, supply any omission or reconcile any inconsistency in such a manner as it may deem advisable to carry out the purpose of the Plan;

(c) To authorize the payment of benefits hereunder, and to determine all questions concerning eligibility, status, benefits, and rights of all persons hereunder and all other

questions arising in the administration of the Plan;

(d) To employ or retain such actuaries, attorneys, accountants, physicians, investment advisors, consultants, specialists and other persons or firms as it deems necessary or desirable to advise or assist in the performance of its duties.

All determinations and actions of the Committee shall be final and conclusive on the Company, the Trustee, Participants, Employees, Beneficiaries, joint annuitants, and all other persons.

12.6 Uniformity of rules

The Committee, at all times, in the administration of the Plan and in the interpretation and application of the

provisions of the Plan, shall exercise all powers and authority given it in a non-discriminatory manner, and shall apply uniform administrative rules of general application in order to assure similar treatment to all persons in similar circumstances.

12.7 Records and record keeping

The Committee shall keep a record of its proceedings, acts and decisions, and shall keep all data, records, books of account and instruments pertaining to Plan administration, which shall be subject to inspection or audit by the Company at any time. The Company shall supply all Employee data and other information required by the Committee to administer the Plan, and the Committee may rely upon the accuracy of such information.

12.8 Limitation of liability

No Committeeman shall be liable for any act done or omitted by him, unless due to his own gross negligence or willful misconduct, or for any act done or omitted by any other Committeeman, except as provided by ERISA. The Company shall indemnify and save harmless any Committeeman against all claims, loss, damages, liability, costs and expenses arising out of any act done or omitted (whether by him, the Committee or any other Committeeman), unless due to his gross negligence or willful misconduct.

12.9 Benefit claims procedure

In the event of a claim by any person as to the amount of any distribution or its method of payment, such person shall present the reason for the claim in writing to the Committee. The

Committee, in its discretion, may request a meeting to clarify any matters it deems pertinent. A claimant who is denied a claim will be given written notice by the Committee that describes:

(a) The specific reason or reasons for the denial;

(b) The specific reference to the Plan provision(s) on which the denial is based;

(c) Additional material or information necessary (if any) for the claimant to perfect the claim with an explanation of why the additional information is needed:

(d) The fact that the claimant may request a review of his claim denial by the Committee by filing a written request with

the Committee not more than 60 days after receiving written notice of a denial.

If a review of the initial denial is requested in writing and the claim is again denied, the Committee shall again give written notice to the claimant setting forth items (a) and (b) above. All final interpretations, determinations and decisions of the Committee in respect of any matter hereunder shall be conclusive and binding upon the Company, Participants, Employees, and all other persons claiming interest under the Plan, except as otherwise provided by ERISA.

ARTICLE XIII

MEDIUM OF FUNDING

13.1 Establishment of fund

In order to establish a funding medium

to carry out the provisions of the Plan, the Company shall enter into a Trust Agreement with such person, persons or corporation as Trustee, as the Company may select. Such agreement shall become part of the Plan and shall provide that all contributions hereunder paid to the Trustee shall be held, invested, and reinvested until required to provide benefit payments. The Company reserves the right, in its sole discretion, to change the funding medium at any time. In the event of conflict between the provisions of the Plan and those of the Trust Agreement, the provisions of the Trust Agreement shall prevail.

13.2 Funding policy

A funding policy for the Plan shall be established by the Company which shall

be consistent with the objectives of the Plan and the requirements of Title I of ERISA. The Company shall review the funding policy annually at the end of each Plan Year, and at such other time as it deems necessary. In establishing and reviewing such funding policy, the Company shall endeavor to determine the Plan's short-term and long-term objectives and financial needs, taking into account the need for liquidity to pay benefits and the need for investment growth. All actions of the Company taken pursuant to this Section 13.2 and the reasons therefor shall be recorded and communicated to the Trustee and any investment manager appointed by the Company.

ARTICLE XIV

AMENDMENT AND TERMINATION

14.1 Right to amend

The Company shall have the right, at any time and from time to time, to amend by vote of its board of directors, any or all of the provisions of the Plan without the consent of any person. However, no such amendment shall authorize or permit any part of the Trust Fund to be used for or directed to purposes other than the exclusive benefit of the Participants or their Beneficiares or estates prior to satisfaction of all liabilities under the Plan (except as provided in Section 11.3) nor shall any such amendment affect adversely in any way any vested rights theretofore acquired under the Plan.

14.2 Right to terminate

It is the expectation of the Company that the Plan shall be permanent and

that payment of contributions shall continue indefinitely and regularly as provided herein. However, the Company reserves the right to reduce, suspend, or discontinue its contributions under the Plan at any time or terminate the Plan at any time.

14.3 Provisions upon termination

(a) Upon termination of the Plan, each Participant shall have a fully vested and nonforfeitable interest in his Accrued Benefit to the extent his Accrued Benefit is funded as of the date of such termination. No Employee shall be admitted to participation under the Plan after the Plan is terminated.

(b) Upon termination of the Plan, the assets of the Trust Fund, after payment of any expenses,

taxes or proper charges of the Trustee, shall be allocated among Participants and beneficiaries under the Plan in the order of precedence set forth in Section 4044 (or any replacing section) of ERISA and the regulations promulgated thereunder. If the assets of the Trust Fund available for such allocation are not sufficient to provide in whole the amounts required within the classes as set forth by ERISA, such assets shall be allocated pro rata within the class in which the amounts first cannot be provided in full. Allocation in any of the classes shall be adjusted for any allocation previously made to the same

individual under a prior class. The allocation of assets may be modified by the Internal Revenue Service to meet nondiscrimination requirements.

(c) The assets of the Trust Fund, if any, remaining after the satisfaction of all liabilities under the Plan shall be returned to the Company.

(d) The Committee shall determine whether to disburse the interest of Participants and their Beneficiaries as immediate pension payments, to retain such interest in the Trust Fund and disburse them in the future in accordance with Plan provisions pertaining to pension payments, to purchase non-transferable immediate or deferred annuities

to provide pension payments, or to use such other method the Committee deems advisable in order to furnish whatever pension the Trust Fund resources will provide. The determination of the Committee shall be conclusive and binding on all persons.

(e) In the event of a partial termination of the Plan, each Participant in respect of whom the Plan is terminated shall have a fully vested and nonforfeitable interest in his Accrued Benefit, to the extent his Accrued Benefit is funded as of the date of such partial termination. The extent to which each such Participant's Accrued Benefit is funded as of

such date shall be determined by allocating assets prusuant to the provisions of this Section 14.3 as if the Plan had been terminated on such date as to all Participants. The assets thus allocated to the Participants in respect of whom the Plan is terminated shall be applied for the benefit of such Participants in such manner as the Committee shall determine in accordance with the provisions of this Section 14.3 which describe the methods by which the Committee may provide benefits upon complete termination of the Plan and which shall also apply in the case of partial termination of the Plan.

(f) The provisions of this Section 14.3 shall be subject to the provisions of Article XV and to the rules, regulations, directives or orders of the United States Treasury Department or the Pension Benefit Guaranty Corporation pursuant to authority granted them by ERISA.

(g) For purposes of this Section 14.3, "Participant" means a Participant or a former Participant and a payment in respect of a Participant, such as a payment to his beneficiary, shall have priority as if it were a payment to such Participant. For purposes of this Section 14.3, "beneficiary" means any person (including a

joint annuitant) entitled to receive a benefit hereunder after the death of a Participant.

14.4 Limitation on meaning of termination

An amendment terminating participation of a designated class of Employees shall not be deemed a termination of the Plan with respect to such class, if:

(a) participation of such group on another pension plan toward which the Company contributes is substituted for participation hereunder, and

(b) the Employees in such class consent to the substitution either individually or through a duly recognized collective bargaining agent.

As used in this section, the

expression "another pension plan" shall not include benefits under the Social Security Act or under any other program administered by the United States of America, or any state, district, territory, or subdivision thereof, or by an agency of any of the foregoing.

14.5 Notice to trustee

The Company shall deliver to the Trustee a copy of any vote or instrument amending or terminating this Plan.

ARTICLE XV

SPECIAL PROVISION TO PREVENT DISCRIMINATION

15.1 Restrictions

Notwithstanding any provision of the Plan to the contrary, while the restrictions of this article are applicable, the amount of pension

benefits provided by Company contributions for any Employee who is among the twenty-five highest compensated Employees on the restriction starting date (defined in Section 15.6) and whose anticipated normal annual pension benefit attributable to such contributions is greater than $1500, shall not exceed, in the aggregate, the Actuarial Equivalent of a single sum, due on his restriction calculation date (defined in Section 15.7), equal to the greater of:

(a) If the restriction starting date is the date of an amendment to the plan increasing benefits, the aggregate benefit to which such Employee would have been entitled under the Plan without regard to such amendment;

(b) $20,000;

(c) The sum of (i) 20 percent of the first $50,000 of such Employee's average annual compensation during his last 5 years of employment with the Company multiplied by the number of years between the restriction starting date and his restriction calculation date, plus (ii) if the restriction starting date is the date of an amendment to the Plan increasing benefits, the aggregate benefit to which the Employee would have been entitled under the Plan if the Plan had terminated on the day before such restriction date.

15.2 Period during which restrictions apply

Provided the Plan shall not then have

been terminated, the restrictions set forth in this article shall remain applicable until the first date, on or after the tenth anniversary of the restriction starting date on which the full current costs are funded, and thereafter shall cease to apply. If the Plan shall be terminated prior to such date, the restrictions of this article shall remain applicable indefinitely.

15.3 Exception to restrictions

During any period when the full current costs of the Plan have been met, and provided the Plan shall not have been terminated, the restrictions of this article shall not prevent the payment of any pension benefits on behalf of an Employee who dies, nor the payment of any pension benefit withheld for a prior year pursuant to

such restrictions, nor the payment to any Employee of:

(a) his full accrued monthly retirement benefit commencing on his normal retirement date; or

(b) an Actuarial Equivalent of such benefit which provides for monthly payments not greater than those payable under paragraph (a) above; or

(c) an Actuarial Equivalent of such benefit payable in a lump sum upon his termination of employment with the Company.

However, if a lump sum distribution exceeds the amount payable under the provisions of Section 15.1, such distribution shall be made under a special agreement between the Trustee and the Employee. The agreement shall provide for immediate repayment of the

excess amount, with interest, by the employee (or his estate) if the Plan is terminated or the full current costs are not met any time during the period on which the restrictions of this article are applicable. The agreement shall include provisions for securing the obligation of the Employee by the deposit of property with a suitable depository.

15.4 Reallocation of resources

In the event of the complete discontinuance of Company contributions or termination of the Plan, the amount of any reduction in allocation to an Employee necessary to comply with the restrictions of this article shall be reallocated among Employees not affected by this article and such reallocation shall be made in accordance with the provisions of

Section 14.3. Any assets remaining after full provision is made for all liabilities under the Plan for Employees not affected by this article shall be reallocated among Employees whose benefits are restricted by this Section, and such reallocation shall be made in accordance with the provisions of Section 14.3.

15.5 Full current cost defined

For the purpose of this article, the term "full current costs" means the normal cost for all years since the effective date of the Plan, plus interest on any unfunded liability during such periods.

15.6 Restriction starting date defined

"Restriction starting date" shall mean the effective date of the Plan and the effective date of any amendment to the Plan substantially increasing benefits

under the Plan.

15.7 Restriction calculation date defined

"Restriction calculation date" shall mean, for any Employee at any time, the earliest of (i) the date of termination of the Plan (ii) the date of failure to meet full current costs and (iii) the date his pension benefit under the Plan becomes payable. It is provided, however, that in the event full current costs again become funded, following a failure to so fund, then such failure shall be disregarded in subsequent determinations.

15.8 Adjustment upon termination of restricted period

As of the date on which the restrictions of this article cease to apply, each distributee for whom any benefit payment was reduced or omitted

on account of such restrictions (or, in the case of his death, his estate) shall become entitled to a single sum equal to the amount of each such reduction, or omission, with interest (such interest shall be compounded annually at the rate in use during the period of reference for preparing actuarial valuations of Plan costs). Thereafter, any benefits remaining to be paid shall not be affected by the restrictions of this article.

15.9 Restrictions to cease when not required by regulations

The restrictions of this article are included in the Plan to conform to the requirements of Section 1.401-4(c) of the Treasury Regulations (or any substitute therefor) and shall cease to be effective at such time as the provisions of Section 1.401-4(c) of

the Treasury Regulations (or any substitute therefor) are no longer effective or applicable.

ARTICLE XVI

MISCELLANEOUS PROVISIONS

16.1 Spendthrift provisions

No benefit, right or interest of any person hereunder shall be subject to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, seizure, attachment or other legal, equitable or other process, or liable for, or subject to the debts, liabilities or other obligations of such person.

16.2 Incompetency of benefit recipient

If the Board deems any benefit recipient incapable of receiving benefit payments by reason of minority, illness, infirmity or other incapacity, it may direct that such

payments by (sic) applied directly for the benefit of such benefit recipient, or it may direct that such payments be made to a person selected by the Committee to disburse them for the benefit of such benefit recipient, and the receipt of such person for any such payment shall be a complete acquittance therefor. Any such payment, to the extent thereof, shall discharge the liability of the Trust Fund for payment of benefit payments to such benefit.

16.3 Limitation on rights and benefits

Nothing appearing in or done pursuant to the Plan shall be held or construed:

(a) to give any person any legal or equitable right or interest in the Trust Fund or any part thereof or distribution

therefrom, or against the Company, except as expressly provided herein or as provided by ERISA.

(b) to create a contract of employment with any Employee, to obligate the Company to continue the services of any Employee, or to affect or modify his terms of employment in any way;

(c) to allow either service as a sole proprietor or a partner or compensation therefor to be taken into account for any purpose hereunder.

16.4 Benefits subject to adequacy of Trust Fund

The Company does not guarantee the payment of benefits hereunder, and all persons shall look soley to the Trust Fund for any payments under the Plan,

and such payments shall be made only to the extent that the Trust Fund is sufficient therefor, except as may be otherwise provided by ERISA.

16.5 Trust Fund for exclusive benefit of Employees

Notwithstanding any other contrary provision of the Plan or the Trust Agreement, no part of the Trust Fund shall revert to the Company, except as provided in Sections 11.3 and 14.3 and no part of the Trust Fund, other than such part as is required to pay taxes, if any, or administration expenses chargeable against the Trust Fund, shall be used for any purpose other than the exclusive benefit of Employees of the Company or their Beneficiaries, pursuant to the provisions of the Plan.

16.6 Plan mergers

In the case of any merger or consolidation of this Plan with, or transfer of assets or liabilities of this Plan to, any other Plan, the benefit of each Participant of this Plan shall be as great if such other plan were to terminate immediately after such merger, consolidation or transfer as it would have been if this Plan had terminated immediately before such merger, consolidation or transfer.

16.7 Latest commencement of benefits

Notwithstanding any other provision of the Plan to the contrary, the distribution of any benefit payable hereunder to a Participant shall begin no later than 60 days after the later of:

(a) the close of the Plan Year in which the Participant attains

age 65; or

(b) the 10th anniversary of the close of the Plan Year in which the Participant commenced participation in the Plan, or

(c) the close of the Plan Year in which the Participant ceased to be in the employ of the Company or an Affiliated Company.

16.8 State of jurisdiction

The provisions of this Plan shall be construed, enforced and administered according to the laws of the State of Virginia, subject, however, to the provisions of ERISA.

C E R T I F I C A T E

This is to certify that the attached copy of the Coleman Furniture Corporation Pension Plan as amended and restated December 1, 1984, is a true and complete copy of the original document.

/s/ Roy V. Creasy 11/24/87
Roy V. Creasy, (date)
Plan Administrator

STATE OF VIRIGNIA)
) to-wit:
CITY OF ROANOKE)

The foregoing Certificate was subscribed and acknowledged before me this /s/ 24th day of /s/ November, 1987, by Roy V. Creasy.

/s/ Zella M. Field
Notary Public

My Commission expires:

April 16, 1991

COLEMAN FURNITURE CORPORATION
PENSION PLAN

Effective date
December 1,1963

As Amended and Restated
December 1, 1984

TABLE OF CONTENTS

ARTICLE PAGE

[Table of Contents omitted in Printing]

INTRODUCTION

The Coleman Furniture Corporation Pension Plan became effective September 1, 1963, and was subsequently amended with the most recent amendment and restatement being effective December 1, 1976.

Effective July 19, 1984, the Plan was terminated and all participants were fully vested; however, the Plan shall recognize that a partial termination occurred on October 30, 1981.

The amended and restated Retirement Plan herein contained constitutes an amendment, effective December 1, 1984, to the earlier Plan provisions rather than a restatement of such Plan. The Plan

provisions in effect immediately prior to this December 1, 1984 amendment shall remain in effect for those Participants who are not actively employed by the Employer at any time after December 1, 1984, except that the following sections of this amended and restatement Retirement Plan shall apply to those Participants: Sections 1.02, 4.04, 4.05, 4.06, 5.05, 6.02, the seventh and ninth paragraphs of 6.04, 8.04, 9.02, Article XI, and Section 12.11.

Effective December 1, 1984, the Plan as amended and restated has the terms and provisions hereinafter set forth.
Revised 12/8/86

ARTICLE I

DEFINITIONS

As used herein and in the concomitant Trust Agreement, unless otherwise required by the context, the following words and

phrases shall have the meanings indicated:

1.01 Accrued Benefit means, for any Participant, as of any date, the monthly retirement benefit determined in accordance with Section 4.01 with Final Average Compensation and Benefit Accrual Service as of the date of reference, and Primary Social Security Benefit determined as the Primary Social Security Benefit that would be applicable at the Participant's attainment of age sixty-five (65) assuming (a) no change in the Federal Social Security Act between the first day of the Plan Year of such determination and the Participant's attainment of age sixty-five (65) and (b) the Participant would continue to receive until age sixty-five (65) earnings which would be treated as wages for the purposes of the Federal

Social Security Act at the same rate as he was receiving at such determination date. It is provided, however, that such Accrued Benefit shall not exceed the greater of:

1.01(a) One dollar and twenty-five cents ($1.25) multiplied by the total amount of his Benefit Accrual Service at the date of reference, not to exceed twenty (20) years; or

1.01(b) The monthly retirement benefit to which he would be entitled commencing at his Normal Retirement Date determined under the normal retirement benefit formula (based upon his Final Average Compensation and Primary Social Security

Benefit as of the date of reference, but based upon the total amount of Benefit Accrual Service which he would have at his Normal Retirement Date if he should continue to accrue Benefit Accrual Service from the date of reference to his Normal Retirement Date) multiplied by a fraction, the numerator of which is the total amount of his Benefit Accrual Service at the date of reference and the denominator of which is the total amount of Benefit Accrual Service which he would have at his Normal Retirement Date if he

should continue to accrue Benefit Accrual Service from the date of reference to his Normal Retirement Date.

1.02 Actuarial Equivalent means a benefit of equivalent value when computed on the basis of interest and mortality tables adopted by the Corporation for use in the computation of actuarial equivalents under the Plan. Such Actuarial Equivalent shall be reflected hereunder by the application of the factors denoted in the Appendix to this Plan.

1.03 Affiliate means a corporation which is a member of the same controlled group of corporations [as defined in IRC Sections 414(b), (c) and (m)] as the Employer but which is not an Employer.

1.04 Bankruptcy Trustee means Roy V. Creasy

or such other person or persons authorized by the bankruptcy court to administer the Plan.

1.05 Beneficiary means any person designated by a Participant or otherwise entitled to receive such benefits as may become payable under the provisions of the Plan after the death of such Participant.

1.06 Benefit Accrual Service means as of any date the sum of past service, if any, under Section 1.06(a) and future service under Section 1.06(b), subject to Section 1.06(c) below, if applicable.

1.06(a) If the Employee was employed by the Employer on December 1, 1976, and a participant of the prior plan, he shall receive credit for past service.

Past service shall mean the number of years and completed months of continuous employment by the Employer of an Employee from his most recent hiring date prior to December 1, 1976, until November 30, 1976.

1.06(b) Future service shall be the total number of Plan Years during which the Employee has at least one thousand (1,000) Hours of Service for the Employer during the period of time commencing on the later of (i) December 1, 1976; or (ii) if Section 1.06(c) is applicable, the first day of a Plan Year coincident

with or immediately preceding the applicable reemployment date.

1.06(c) Notwithstanding the above, if a terminated Participant is subsequently reemployed and again becomes a Participant, his Benefit Accrual Service shall not include any periods of employment prior to reemployment if his consecutive One Year Breaks in Service as of his reemployment date are equal to or exceed the greater of (i) five (5) consecutive One Year Breaks in Service or (ii) the Participant's Benefit Accrual Service as of his termination date and

his vested benefit pursuant to Section 6.04 was zero at date of termination. However, the provisions of Section 1.06(c)(i) shall only apply to Employees actively participating in the Plan for periods on and after the first day of the Plan Year following December 31, 1984.

1.06(d) In the case of an Employee who first become a Participant in the Plan on December 1, 1976, and who, on such date, does not satisfy the eligibility requirements of the Plan as in effect on November 30, 1976, any Beneficiary Accrual Service before

December 1, 1976, shall be disregarded.

1.06(e) Any Benefit Accrual Service after the Employee's Normal Retirement Date shall be excluded.

1.07 Board means the board of directors of the Corporation.

1.08 Compensation means, for any Employee, the total earnings, prior to withholding, paid to him by the Employer as evidenced on Internal Revenue Service Form W-2 or on a similar government reporting form, including overtime payments, bonuses and commissions but excluding any contributions by the Employer to this or any other employee benefit program. Compensation of an Employee who is at any time simultaneously in the employ of more than one Employer shall be the

sum of such earnings received by the Employee from all such Employers.

1.09 Contributions means the payments as provided herein by the Employer to the Fund.

1.10 Corporation means Coleman Furniture Corporation, a Virginia corporation, or any successor thereto. The Corporation is the sponsor, plan administrator and named Fiduciary as it relates to the employees of each Employer.

1.11 Credited Service means as of any date the sum of past service, if any, under Section 1.11(a) subject to Section 1.11(b) below, if applicable.

1.11(a) Any year of Credited Service before December 1, 1976, shall be disregarded if such year of Credited Service would have been

disregarded under the rules of the Plan with regard to breaks in service and length of service in effect from time to time before such date;

1.11(b) Notwithstanding the above, if a terminated Participant is subsequently reemployed and again becomes a Participant, his Credited Service shall not include any periods of employment prior to reemployment if his consecutive One Year Breaks in Service as of his reemployment date are equal to or exceed the greater of (i) five (5) consecutive One Year Breaks in Service or (ii) the Participant's

Credited Service as of his termination date and his vested benefit pursuant to Section 6.04 was zero at date of termination. However, the provisions of Section 1.11(c)(i) shall only apply to Employees actively participating in the Plan for periods on and after the first day of the Plan Year following December 31, 1984.

For purposes of determining the vesting percentage in Section 6.04:

1.11(c) Periods of employment with an Affiliate which would have constituted a Plan Year of Service had the Participant been employed by the Employer shall be

included as if such periods had been performed for the Employer; and

1.11(d) Effective for periods prior to December 1, 1985, any Credited Service prior to the Plan Year in which the Participant attains the age of twenty-two (22) shall be excluded. Effective for periods commencing on and after December 1, 1985, any Credited Service prior to the Plan Year in which the Participant attains the age of eighteen (18) shall be excluded. In no event, however, shall this provision opoerate to decrease any Credited Service for vesting

purposes prior to such date.

1.12 Defined Benefit Plan means a plan established and qualified under IRC Section 401 or 403, except to the extent it is, or is treated as, a Defined Contribution Plan.

1.13 Defined Contribution Plan means a plan which is established and qualified under IRC Section 401 or 403, which provides for an individual account for each Participant therein and for benefits based solely on the amount contributed to each Participant's account and any income and expenses or gains or losses (both realized and unrealized) which may be allocated to such accounts.

1.14 Effective Date means December 1, 1963, or such later date as of which an Employer shall have adopted the Plan

for its Employees.

1.15 Employee means any person employed by the Employer and any person considered a leased employee within the definition of IRC Section 414(n) other than a person who is represented by a collective bargaining unit for the purpose of bargaining with the Employer with respect to wages, hours of employment or other conditions of employment unless the resulting bargaining agreement provides for participation in the Plan. In the event a leased employee is entitled to a benefit hereunder, such benefit shall be reduced by the Actuarial Equivalent of any benefit said leased employee receives from any qualified plan sponsored by the leasing organization.

1.16 Employer means, collectively or

individually as the context may indicate, the Corporation and any other corporation which (a) is a member of the same controlled group of corporations as the Corporation as determined pursuant to IRC Sections 414(b), (c) and (m), (b) the Board shall have authorized to adopt the Plan, and (c) by action of its own board of directors shall have adopted the Plan and become signatory to the Trust Agreement; or any successor to one or more of such entities.

1.17 ERISA or Act means the Employee Retirement Income Security Act of 1974.

1.18 Fiduciary means the Corporation, the Employer, the Trustee, the Plan Administrator and any individual, corporation, firm or other entity which assumes in accordance with

Article VIII responsibilites of the Corporation, the Employer, the Trustee or the Plan Administrator respecting management of the Plan or the disposition of its assets.

1.19 Final Average Compensation means, for any Employee as of any date, his Compensation averaged over the most recent one hundred twenty (120) months of participation in the Plan before his Normal Retirement Date and through his computation date. However, if his Final Average Compensation is to be determined as of any computation date when he has completed fewer than one hundred twenty (120) months of participation in the Plan before his Normal Retirement Date, his Final Average Compensation shall be his Compensation averaged over the most recent one hundred twenty (120) months

(or if shorter, the entire period) of his employment with the Corporation before his Normal Retirement Date and through his computation date (whether or not such employment was rendered as a Participant). Notwithstanding anything herein to the contrary, the Final Average Compensation during any period subsequent to the date a Participant is first eligible for early retirement shall never be less than a Participant's Final Average Compensation as of any date commencing after such date and ending on his Normal Retirement Date.

In the event an Employee's service is disregarded pursuant to Sections 1.06 and 1.11 for purposes of determining Final Average Compensation, such service shall be disregarded.

1.20 Fund means the trust fund created in accordance with Article VII hereof.

1.21 Hours of Service means the sum of:

1.21(a) Each hour for which an employee is paid, or entitled to payment for the performance of duties for the Employer during the applicable computation period.

1.21(b) Each hour for which an employee is paid, or entitled to payment, by the Employer on account of a period of time during which no duties are performed (irrespective of whether the employment relationship has terminated) due to vacation, holiday, illness, incapacity (including

disability), layoff, jury duty, or leave of absence. However, the determination of hours under this Section 1.21(b) shall be subject to the following restrictions:

1.21(b)(i) No more than five hundred one (501) hours shall be credited to an employee during any single continuous period during which the employee performs no duties (whether or not such period occurs in a single computation period).

1.21(b)(ii) No such hours shall be credited to an employee if payment is made or due under a plan maintained soley for the purpose of complying with applicable

workers' compensation or unemployment compensation or disability insurance laws.

1.21(b)(iii) Hours shall not be credited for a payment which solely reimburses an employee for medical or medically related expenses incurred by the employee.

1.21(c) Each hour during which an employee is paid, or entitled to payment, by the Employer on account of a period of time during which no duties are performed due to military duty and any other periods in which an employee was not paid or entitled to payment and would presumably have

performed services for the Employer but for the fact that such individual was on a military leave of absence for service in the armed forces of the United States of America, provided the individual entered such service directly from the employ of the Employer, was discharged from such service and was reemployed by the Employer within the period during which his employment rights as a veteran are protected by law.

1.21(d) Each hour for which back pay, irrespective of mitigation of damages, is either awarded or agreed to

by the Employer provided, however, that the same hours shall not be credited both under Section 1.21(a), Section 1.21(b) or Section 1.21(c) above, as the case may be, and under this Section 1.21(d).

Hours of Service shall not include any period during which the Employee was employed by a predecessor of the Employer, unless the predecessor's organization maintained the Plan or a predecessor plan.

Hours of Service under Section 1.21(a), Section 1.21(c) and Section 1.21(d) above shall be determined from the Employer records. Hours of Service under Section 1.21(b) above shall be determined in accordance with Department of Labor Regulations

2530.200b-2. Hours of Service hereunder shall be credited to the appropriate computation period in accordance with Department of Labor Regulation 2530.200b-2(c). Notwithstanding anything herein to the contrary, nothing in this Sectin 1.21 shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States or any rule or regulation issued under any such law.

1.22 IRC or Code means the Internal Revenue Code of 1954, as amended from time to time. Any reference to any section of the IRC shall be deemed to include any applicable regulations and rulings pertaining to such section and shall also be deemed a reference to comparable provisions of future laws.

1.23 Key Employee means any person, former

employee or the beneficiary of a former employee in an Employer plan who at any time during the Plan Year or any of the four (4) preceding Plan Years is:

1.21(a) an officer of the Employer having an annual compensation greater than one hundred fifty percent (150%) of the amount in effect under IRC Section 415(c)(1)(A) for any such Plan Year;

1.23(b) one (1) of the ten (10) employees having annual compensation from the Employer of more than the limitation in effect under IRC Section 415(c)(1)(A) and owning (or considered as owning within the

meaning of IRC Section 318) more than a one-half percent (½%) interest and the largest interest in the Employer;

1.23(c) a five percent (5%) owner of the Employer; or

1.23(d) a one percent (1%) owner of the Employer having an annual compensation from the Employer of more than one hundred fifty thousand dollars ($150,000).

With respect to Section 1.23(b) above, if two (2) Employees have the same interest in the Employer, the Employee having the greater annual compensation from the Employer shall be treated as having a larger interest.

The term "non-Key Employee" shall

mean an employee who is not a Key Employee.

For purposes of this Section 1.23, "compensation" shall have the same meaning as in Section 4.07(b).

This definition shall be interpreted consistent with IRC Section 416 and rules and regulations issued thereunder. Further, such law and regulations shall be controlling in all determinations under this definition, inclusive of any provisions and requirements stated thereunder but hereinabove absent.

1.24 Limitation Year means the twelve (12) month period commencing on December 1 and ending on November 30.

1.25 Normal Retirement Age means the date a Participant attains the age of sixty-five (65).

1.26 One Year Break in Service means a Plan

Year during which the Employee has not completed more than five hundred (500) Hours of Service.

For periods commencing on or after December 1, 1985, and to the extent not already credited, Hours of Service shall be credited solely for purposes of determining whether a One Year Break in Service has occurred with respect to an Employee who is absent from work regardless of whether the Employee is paid for such absence:

1.26(a) By reason of the pregnancy of the Employee,

1.26(b) By reason of the birth of a child of the Employee,

1.26(c) By reason of the placement of a child with the Employee in connection with the adoption of such child by such Employee, or

1.26(d) For purposes of caring for such child for a period beginning immediately following such birth or placement.

Hours of Service to be credited for such purpose shall be:

(i) the Hours of Service which otherwise would normally have been credited to such Employee but for such absence, or

(ii) in any case in which the Plan Administrator is unable to determine the hours in (i) above, eight (8) Hours of Service per normal workday of absence,

except that the total number of hours treated as Hours of Service by reason of any such pregnancy or placement shall not exceed five hundred one

(501) hours. The hours in items (i) and (ii) above shall be treated as Hours of Service hereunder:

(iii) only in the Plan Year in which the absence from work begins, if an Employee would be prevented from incurring a One Year Break in Service in such Plan Year solely because the period of absence is treated as Hours of Service as provided in Section 1.26(a), Section 1.26(b), Section 1.26(c) or Section 1.26(d) above; or

(iv) in any other case, in the immediately following Plan Year.

Further, the Plan Administrator may request that the Employee furnish any information the Plan Administrator may require to establish that the absence is for the reasons

hereinbefore provided and the number of days for which there was such an absence. In the event such information is not submitted in a timely manner, no Hours of Service shall be credited pursuant to this paragraph.

1.27 Participant means any Employee who becomes a Participant as provided in Article II hereof.

1.28 Plan means the Coleman Furniture Corporation Pension Plan, as contained herein or as duly amended.

1.29 Plan Administrator means the administrator of the Plan provided for in Article VIII hereof.

1.30 Plan Year means each twelve (12) month period beginning on December 1 and ending on November 30.

1.31 Primary Social Security Benefit means, for any Participant as of any date,

the annual income to which the Participant is entitled under the provisions of the Federal Social Security Act as in effect on the first day of the Plan Year of determination without reflecting any reduction therein for the commencement of benefits on or after the attainment of age sixty-five (65) and the date the Participant would be eligible for benefits. If a Participant does not qualify for, or loses, Social Security benefits to which he is entitled under the Federal Social Security Act because of failure to make application therefor, or entering into covered employment, such Social Security benefits shall nevertheless be considered, for purposes of the Plan, as being received by such Participant. The Primary Social Security Benefit

with respect to any Participant shall be established by the Plan Administrator on the basis of such evidence as may be available to it and reasonable assumptions based thereon pursuant to the following.

In lieu of calculating the Primary Social Security Benefit using the Participant's actual wage history, the Plan Administrator may estimate such amount provided the following rules are met:

1.31(a) The Participant's wage history may be estimated for a portion or all periods prior to the date of determination provided that the rate used for such retrospective projection is either (i) the actual change in the average wages

from year to year as determined by the Social Security Administration or (ii) six percent (6%) per annum.

1.31(b) In the event an estimated Primary Social Security Benefit is used in the calculation of a Participant's benefit hereunder, such Participant shall receive written notice to that effect. Further, the notice shall inform the Participant of his right to supply his actual salary history to the Plan Administrator and of the financial consequences of not supplying such history.

The notice shall also inform the Participant that his actual salary history can be obtained from the Social Security Administration.

This notice must be distributed to Participants each time the summary plan description is provided as well as upon separation from service.

1.31(c) In the event the Participant supplies documentation of his salary history within a reasonable period of time following the later of the date he separates from service (by retirement or otherwise) and the time when the

Participant is notified of the benefit to which he is entitled, the Participant's benefit will be adjusted retroactively to its commencement date to reflect actual salary history for periods previously estimated subject to the following:

(i) A period of twelve (12) months from the appointed date shall be deemed reasonable for purposes of this Section 1.31(c); and

(ii) The adjustment effectuated hereunder could have the effect of increasing as well as decreasing a Participant's monthly retirement benefit.

Sections 1.31(b) and 1.31(c) above shall only apply with respect to any Employee employed during any Plan Year beginning after December 31, 1983. Further, the application of this Section 1.31 shall be made by the Plan Administrator in a uniform and nondiscriminatory manner.

1.32 Spouse means the person to whom the Participant is legally married.

1.33 Top Heavy Plan generally means, on or after January 1, 1984, any plan under which, as of any determination date the present value of the cumulative accrued benefits under the plan for Key Employees exceeds sixty percent (60%) of the present value of the cumulative accrued benefits under the plan for all Employees.

For purposes of this definition:

1.33(a) If such a plan is a Defined

Benefit Plan, the present value of cumulative accrued benefits shall be the lump sum present value determined pursuant to Article XI. If such plan is a Defined Contribution Plan, the present value of cumulative accrued benefits shall be deemed to be the market value of all Employee accounts under the plan. Notwithstanding the above, for purposes of determining the present value of the accrued benefits, distributions made within a five (5) year period ending on the determination date must be included.

1.33(b) A plan shall be considered a Top Heavy Plan for any Plan Year if, on the last day of the preceding Plan Year, the above rules were met. For the first Plan Year that the Plan shall be in effect the determination of whether said Plan is a Top Heavy Plan shall be made as of the last day of such Plan Year. Any such determination shall be based on the valuation date falling within that Plan Year. For this purpose, the valuation date must be the same valuation date used for computing Plan costs for minimum funding regardless of whether a

valuation is performed that year.

1.33(c) Each plan of the Employer required to be included in an "aggregation group" shall be treated as a Top Heavy Plan if such group is a top heavy group.

1.33(d) The term "aggregation group" means

(i) each plan of the Employer in which a Key Employee is a Participant and

(ii) each other plan of the Employer which enables any plan in (i) to meet the requirements of IRC Section 401(a)(4) or 410.

A permissive aggregation group consists of plans of the Employer that are required to be

aggregated, plus one (1) or more plans of the Employer that are not part of a required aggregation group but that satisfy the requirements of IRC Sections 401(a)(4) and 410 when considered together with the required aggregation group.

1.33(e) If any individual has not received any compensation from any Employer (other than benefits under the Plan) at any time during the five (5) year period ending on the determination date, any accrued benefit for such individual shall not be taken into account in the testing procedure herein described.

1.33(f) This definition shall be

interpreted consistent with IRC Section 416 and rules and regulations issued thereunder. Further, such law and regulations shall be controlling in all determinations under this definition inclusive of any provisions and requirements stated thereunder but hereinabove absent.

1.34 Trust Agreement means the agreement entered into between the Employer and the Trustee pursuant to Article VII hereof.

1.35 Trustee means such individual, individuals or financial institution, or a combination of them as shall be designated in the Trust Areement to hold in trust the assets of the Plan, and shall include any successor

Trustee to the Trustee initially designated thereunder.

1.36 Year of Service means for any Employee, a stated twelve (12) consecutive month period during which such Employee completed one thousand (1,000) or more Hours of Service as an Employee.

In the event an Employee is simultaneously in the employ of more than one Employer or is transferred from the employment of one Employer to the employment of another Employer, the number of Hours of Service completed during any twelve (12) consecutive month period shall be the sum of the number of Hours of Service completed for all Employers during such period. For purposes of determining participation in Article II:

1.36(a) Periods of employment with an Affiliate which would have constitued a Year of Service had the Employee been employed by the Employer shall be included as if such periods had been performed for the Employer; and

1.36(b) Periods of employment with the Employer other than as an Employee which would have constituted a Year of Service had the Employee been employed as an Employee shall be included as if such periods had been performed as an Employee.

ARTICLE II

PARTICIPATION

2.01 Eligibility - Each person who was a

Participant on November 30, 1984, subject to the provisions hereinafter contained, shall continue as a Participant after such date.

Each person who was not a Participant on November 30, 1984, and each person who becomes an Employee after such date and who is not already a Participant shall automatically become a Participant on the first day of the month coinciding with or next following the latest of (a) the Effective Date, (b) the attainment of age twenty-five (25), and (c) the completion of a Year of Service subsequent to the date on which he completed his first Hour of Service. Notwithstanding anything contained herein to the contrary, effective December 1, 1985, the age twenty-five (25) requirement hereinbefore provided

shall be reduced to age twenty-one (21).

Upon the completion of the first twelve (12) month period noted in (c) above, the twelve (12) month period for determining the Year of Service shall be based on Plan Years starting with the Plan Year in which occurs the first anniversary of the date on which he completed the applicable first Hour of Service.

2.02 Participation - Each person who becomes a Participant shall remain a Participant so long as he remains an Employee, or is entitled to future benefits under the terms of the Plan.

In the event an Employee terminates his employment prior to satisfying the Year of Service requirement and is subsequently reemployed as an Employee, his Years

of Service shall not include any periods of employment prior to reemployment if the Employee's consecutive One Year Breaks in Service as of his reemployment date are equal to or exceed the greater of (1) five (5) consecutive One Year Breaks in Service or (ii) the Employee's Years of Service as of his termination date. However, the provisions of item (i) above shall only apply to Employees actively participating in the Plan for periods on and after the first day of the Plan Year following December 31, 1984.

If a terminated Employee is reemployed after incurring a One Year Break in Service and such Employee was entitled to a vested benefit under Section 6.04 at time of termination of employment or if a terminated Employee

is reemployed at a time which requires retention of his prior Years of Service, then such Employee shall become a Participant on his reemployment date.

2.03 Designation of Beneficiary - Each Participant, on or before becoming entitled to death benefits hereunder, shall designate a Beneficiary on forms furnished by the Plan Administrator, and such forms shall be maintained in files held by the Plan Administrator. The Participant may from time to time change the Beneficiary by written notice to the Plan Administrator and upon such change the rights of all previously designated Beneficiaries to receive any benefits under the Plan shall cease. If at the date of death of the Participant, there is no valid and current Beneficiary designation on

file with the Plan Administrator, then any death benefits which would have been payable to the Beneficiary shall be payable to the Participant's surviving Spouse, if any; if none, to the Participant's children who survive him, equally; or if none survive, then to the Participant's estate. The interpretation of the Plan Administrator with respect to any Beneficiary designation, subject to applicable law, shall be binding and conclusive upon all parties and no person who claims to be a Beneficiary, or any other person, shall have the right to question any action of the Plan Administrator, which in the judgment of the Plan Administrator fulfills the intent of the Participant who filed such designation.

If a Beneficiary designated by a

Participant is not the Participant's Spouse, then the Spouse's consent shall be required for such designation to become effective, and such consent shall be witnessed by a representative of the Plan Administrator or a notary public. The Plan Administrator may accept an election other than that provided hereunder without the consent of the Spouse if there is no Spouse, the Spouse cannot be located, or such other circumstances as may be prescribed by regulations. Any spousal consent shall only be applicable to the Spouse granting such consent.

ARTICLE III

RETIREMENT DATES

3.01 Normal Retirement Date - The Normal Retirement Date of a Participant shall be the first day of the month

coinciding with or next following the later of (i) the date on which the Participant attains his Normal Retirement Age and (ii) the tenth (10th) anniversary of the date he commenced his employment with the Corporation. A Participant reaching his Normal Retirement Date while an Employee may at that date retire from the employment of the Employer; otherwise the provisions of Section 3.02 shall be applicable.

3.02 Delayed Retirement Date - A Participant who remains in the active employ of the Employer after his Normal Retirement Date shall retire on his Delayed Retirement Date. The Delayed Retirement Date of a Participant who continues his employment with the Employer beyond his Normal Retirement Date shall be

the first day of the month coinciding with or next following the actual date the Participant severs his employment with the Employer.

3.03 Early Retirement Date - A Participant may retire from the employment of the Employer on the first day of any month prior to his Normal Retirement Date, provided he has completed at least thirty (30) years of Benefit Accrual Service.

ARTICLE IV

RETIREMENT BENEFITS

4.01 Normal Retirement Benefit - A Participant, upon retirement at his Normal Retirement Date, shall receive a monthly retirement benefit which shall commence on such retirement date and shall be paid in accordance with Article V. The amount of such monthly retirement benefit shall be the larger

of Section 4.01(a) or Section 4.01(b).

401(a) One-Twelfth (1/12) of the excess of Section 4.01(a)(i) over Section 4.01(a)(ii) following:

4.01(a)(i) Fifty percent (50%) of the Participant's Final Average Compensation;

4.01(a)(ii) Eighty-three and one-third percent (83 1/3%) of the Participant's Primary Social Security Benefit,

such amount reduced one-twentieth (1/20) for each year (recognizing a fraction of a year) of Benefit Accrual Service less than twenty (20).

4.01(b) The lesser of 4.01(b)(i) and 4.01(b)(ii) following:

4.01(b)(i) Twenty-Five dollars ($25.00); or

4.01(b)(ii) One Dollar and twenty-five cents ($1.25)

multiplied by the total number of years of Benefit Accrual Service (recognizing a fraction of a year).

4.02 Delayed Retirement Benefit - A Participant, upon retirement at his Delayed Retirement Date in accordance with Section 3.02, shall receive a monthly retirement benefit which shall commence on the date of such retirement and shall be paid in accordance with Article V. The amount of such monthly retirement benefit shall be the larger of Section 4.02(a) or Section 4.02(b).

4.02(a) One-twelfth (1/12) of he excess of Section 4.02(a)(i) over Section 4.02(a)(ii) following:

4.02(a)(i) Fifty percent (50%) of the Participant's Final Average Compensation acturially

increased to reflect the later commencement of his benefit payments;

4.02(a)(ii) Eighty-three and one-third (83 1/3%) of the Participant's Primary Social Security Benefit, determined as of his actual retirement date,

such amount reduced one-twentieth (1/20) for each year (recognizing a fraction of a year) of Benefit Accrual Service less than twenty (20).

4.02(b) The lesser of 4.02(b)(i) and 4.02(b)(ii) following:

4.02(b)(i) Twenty-five dollars ($25.00) actuarially increased to reflect the later commencement of his of his benefit payments; or

4.02(b)(ii) One Dollar and twenty-five cents ($1.25)

multiplied by the total number of years of Benefit Accrual Service (recognizing a fraction of a year), actuarially increased to reflect the later commencement of his benefit payments.

4.03 Early Retirement Benefit - A Participant, upon retirement at his Early Retirement Date in accordance with Section 3.03, shall receive a monthly retirement benefit which shall commence on such retirement date and shall be paid in accordance with Article V. The amount of such monthly retirement benefit shall be determined as the Participant's Accrued Benefit as of his Early Retirement Date. Notwithstanding anything herein to the contrary, a Participant who retires in

accordance with Section 3.03 shall (a) have the right, at any time prior to his Early Retirement Date to elect to receive his early retirement benefit commencing on his Normal Retirement Date and (b) if deferred benefit commencement is elected under (a), have the right, at any time subsequent to his Early Retirement Date but prior to his Normal Retirement Date, to request that the benefit commencement date be at some earlier date. If such early retirement benefit commences before his Normal Retirement Date, the monthly amount of such retirement benefit shall be the Actuarial Equivalent of his Accrued Benefit computed as of his benefit commencement date.

4.04 Reemployment of Retired Participants - If a Participant is reemployed as an

Employee after the commencement of a retirement benefit pursuant to his retirement under the provisions of Sections 3.03 or Section 6.04 but prior to his attainment of the age of sixty-five (65), his retirement benefit shall be discontinued. The Participant's rights to future benefits under the Plan shall be subject to redetermination upon any subsequent termination of employment or retirement under the Plan in accordance with the Plan provisions then in effect. Any benefits thereafter payable shall be reduced on an Actuarial Equivalent basis to reflect the value of the retirement benefit payments received by the Participant in the period during which he was in receipt of a retirement benefit.

Notwithstanding the above paragraph, the monthly retirement benefit thereafter payable shall not be less than the monthly retirement benefit payable immediately before his latest reemployment plus the Actuarial Equivalent of any monthly retirement benefit suspended while the Participant is not employed in such service as is described in Department of Labor Regulations 2530.203-3(c)(1).

If a Participant is reemployed as an Employee after the commencement of a retirement benefit under any of the provisions of the Plan and after the attainment of the age of sixty-five (65), he shall continue to receive the retirement benefit determined and paid in every respect as if he were not so employed by the Employer, and such Participant shall not be entitled to

any additional retirement benefit upon his subsequent termination of employment.

4.05 Maximum Retirement Benefit - Anything herein to the contrary notwithstanding, effective for Plan Years commencing on and after January 1, 1983, the monthly retirement benefit payable in the form of a straight life annuity from the Plan on behalf of a Participant, when combined with any benefits from another qualified Defined Benefit Plan maintained by the Employer, shall not exceed the amount as provided in the following paragraphs of this Section 4.05. If the normal form of payment determined pursuant to Section 5.01 is other than a straight life annuity or a qualified joint and survivor annuity, the amount so determined

hereunder shall be reduced on an Actuarial Equivalent basis to reflect such other payment form with the exception that the interest assumption shall in no event be less than five percent (5%).

If a Participant has completed ten (10) or more years of Benefit Accrual Service, the maximum monthly benefit payable in accordance with this Section 4.05 shall be the smaller of Section 4.05(a) and Section 4.05(b) following:

4.05(a) Seven thousand five hundred dollars ($7,500), or such greater amount, determined by the Secretary of Treasury as of January 1 of each calendar year. Such amount shall be the maximum monthly amount pursuant to

this Section 4.05(a) for that calendar year and shall apply to the Limitation Year ending with or within that calendar year.

4.05(b) The average monthly compensation the Participant received from the Employer during the three (3) consecutive calendar years which would produce the highest such average. For purposs of this paragraph, "compensation" shall mean a Participant's earned income, wages, salaries, fees for professional service and other amounts received for personal

services actually rendered in the course of employment with an Employer maintaining the Plan (including, but not limited to, commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, and bonuses) and excluding the following:

(i) Employer contributions to a plan of a deferred compensation to the extent contributions are not included in gross income of the Employee for the taxable year in which contributed, or on behalf

of an Employee to a Simplified Employee Pension plan to the extent such contributions are deductible under IRC Section 219(b)(7), and any distributions from a plan of deferred compensation whether or not includable in the gross income of the Employee when distributed.

(ii) Amounts realized from the exercise of a non-qualified stock option, or when restricted stock (or property) held by an Employee becomes freely transferable or is no longer subject to a substantial risk of forfeiture;

(iii) Amounts realized from the sale, exchange or other disposition of stock acquired under a qualified stock option; and

(iv) Other amounts which receive special tax benefits, or contributions made by an Employer (whether or not under a salary reduction agreement) towards the purchase of a 403(b) annuity contract (whether or not the contributions are excludable from the gross income of the Employee).

Compensation for any Limitation Year is the compensation actually paid or includible in gross income during such year.

If the payment of a benefit to a Participant begins before he attains age sixty-two (62), the maximum benefit shall be actuarially adjusted to that amount which, if paid in the same form and beginning at the same time as his benefit, would be the Actuarial Equivalent of the maximum benefit payable in the normal form of retirement benefit beginning on the first day of the month coincident with or next following his attaining the age of sixty-two (62) with the exception that the interest assumption shall in no event be less than five percent (5%). The reductions required by this paragraph shall in no event reduce the monthly limitation in Section 4.05(a) below:

(i) Six thousand two hundred - fifty dollars ($6,250), if

the benefit begins on or after the Participant's attainment of age fifty-five (55) or

(ii) the Actuarial Equivalent of the six thousand two hundred fifty dolars ($6,250) monthly benefit at age fifty-five (55), if the benefit begins prior to such age.

If any retirement benefit commences under this Plan after the Participant has attained age sixty-five (65), the determination as to whether the dollar limitation referred to in Section 4.05(a) has been satisfied shall be made by adjusting said benefit to the Actuarial Equivalent of the benefit beginning at the attainment of age sixty-five (65)

with the exception that the interest assumption shall in no event be greater than five percent (5%).

Notwithstanding the preceding provisions of this Section 4.05, the benefits payable with respect to a Participant under this Plan shall be deemed not to exceed the limitations of this Section 4.05 if:

(a) the retirement benefits payable with respect to such Participant under this Plan and under all ohter "qualifed" Defined Benefit Plans to which the Employer contributes do not exceed ten thousand dollars ($10,000) for the applicable Plan Year and for any prior Plan Year and

(b) the Employer has not at any time maintained a "qualified" Defined Contribution Plan in which the

Participant participated.

If a Participant has completed less than ten (10) years of Benefit Accrual Service, the maximum monthly benefit payable in accordance with this Sectin 4.05 shall be the smaller of Section 4.05(a) and Section 4.05(b) above (or in the preceding paragraph, if applicable), multiplied by the ratio that the Participant's actual number of years of Benefit Accrual Service bears to ten (10).

In the event a Participant is covered by one or more Defined Benefit Plans maintained by the Employer, all such plans shall be aggregated in determining whether the maximum benefit limitations hereunder have been met. Further, the maximum retirement benefit as noted above may be decreased as determined necessary

by the Employer to ensure that all plans will remain qualified under the IRC. Any such adjustment by the Employer shall be communicated in writing to the Plan Administrator and the actuary employed on behalf of the Plan.

4.06 Multiple Plan Participation - If an Employee is a Participant in one or more Defined Benefit Plans and one or more Defined Contribution Plans maintained by the Employer, the sum of his Defined Benefit Plan Fraction and his Defined Contribution Plan Fraction shall not exceed 1.0 during any Limitation Year.

If the sum of the Defined Benefit Plan Fraction and the Defined Contribution Plan Fraction shall exceed 1.0 for any Limitation Year, the Employer shall adjust or freeze

the rate of benefit accrual for purposes of a Defined Benefit Plan or the amount of "Annual Additions" [as defined in IRC Section 415(c)(2)] to a Defined Contribution Plan on behalf of any Participant so that the sum of such fractions shall not exceed 1.0.

For purposes of maximum Annual Additions to Defined Contribution Plans and maximum annual benefits payable from Defined Benefit Plans, all Defined Contribution Plans and all Defined Benefit Plans respectively, whether or not terminated, shall be combined and treated as one plan.

For purposes of this Section 4.06, the term, "Defined Benefit Plan Fraction" shall mean a fraction the numerator of which is the Participant's projected annual benefit (as defined in the said defined

benefit plan) determined as of the close of the Limitation Year and the denominator of which is the lesser of:

4.06(a) the product of 1.25 multiplied by the dollar limitation in effect in Section 4.05(a) for such Limitation Year; or

4.06(b) the product of 1.4 multiplied by the amount which may be taken into account in Section 4.05(b) with respect to each individual under the Plan for such Limitation Year.

The term "Defined Contribution Plan Fraction" shall mean a fraction the numerator of which is the sum of all of the Annual Additions to the Participant's individual account under the plan as of the close of the

Limitation Year and the denominator of which is the sum of the lesser of the following amounts determined for such Limitation Year and for each prior Limitation Year of employment with the Employer:

4.06(c) the product of 1.25 multiplied by the dollar limitation in effect pursuant to IRC Section 415(c)(1)(A) for such year determined without regard to IRC Section 415(c)(6); or

4.06(d) the product of 1.4 multiplied by an amount determined pursuant to IRC Section 415(c)(1)(B) with respect to each individual under the Plan for such Limitation Year.

The limitation on aggregate benefits from a Defined Benefit Plan and a Defined Contribution Plan which is contained in Section 2004 of ERISA as amended shall be complied with by a reduction (if necessary) in the Participant's benefits unde this Defined Benefit Plan before a reduction of any such Defined Contribution Plan.

ARTICLE V

NORMAL AND OPTIONAL METHODS OF RETIREMENT BENEFIT PAYMENTS

5.01 Normal Form of Payment - The normal form of payment to which the retirement benefit indicated in Article IV applies shall be a monthly retirement benefit commencing on the Participant's Normal, Delayed or Early Retirement Date, or on the date as specified in Section 6.04 and

continuing on the first day of each month thereafter during his lifetime.

5.02 Available Options - On or about the later of (a) nine (9) months prior to the earlier of meeting the applicable requirements for early or normal retirement, or (b) commencement of participation, each Participant and his Spouse shall be given a written notice to the effect that benefits thereafter payable will be in the form specified in Section 5.04 unless the Participant, with the consent of his Spouse, elects to the contrary prior to the commencement of payments. The notice shall describe, in a manner intended to be understood by the Participant and his Spouse, the terms and conditions of the joint and survivor annuity specified in Section 5.04 and shall include a general

explanation of the financial effect of the election or absence of election.

In the event a Participant or his Spouse requests additional information, as permitted under the terms of the notice, commencement of benefits for any purpose hereunder shall not begin until at least ninety (90) days following the Participant's receipt of such additional information unless the Participant specifically elects earlier commencement.

receipt of such additional information unless the Participant specifically elects earlier commencement. (sic)

Pursuant to the provisions hereinbefore provided in this Section 5.02, each Participant, with the consent of his Spouse, shall have the right to elect to have his retirement benefit paid under any one of the

options hereinafter set forth in this Section 5.02 in lieu of the applicable retirement benefit otherwise provided for in Section 5.01. The amount of any optional retirement benefit shall be the Actuarial Equivalent of the amount of such retirement benefit that otherwise would have been payable to him as provided for in Section 5.01.

A Participant who desires to have his retirement benefit paid under one of the optional forms provided in this Section 5.02 shall make such an election by written request to the Plan Administrator on forms provided by the Plan Administrator. An election by a Participant to receive his retirement benefit under any of the optinal methods of payment as provided in this Section 5.02 may be revoked by such Participant in writing

to the Plan Administrator at any time prior to the commencement of his retirement benefit payments. Any such election or revocation will be subject to the approval of the Plan Administrator with the exception of any election or revocation of the normal form as provided in Section 5.01 or in the case of the joint and survivor annuity as provided in Section 5.04. After retirement benefit payments have commenced, no future elections or revocations of an optional form will be permitted under any circumstances.

5.02(a) PERIOD CERTAIN AND CONTINUOUS OPTION

A Participant may elect to receive a decreased retirement benefit during his lifetime, and in the event of his death

subsequent to retirement but before one hundred twenty (120) monthly retirement benefit payments have fallen due, such decreased retirement benefit shall be continued to his Beneficiary until the remainder of the one hundred twenty (120) monthly payments have been paid. If the designated Beneficiary is not living at the death of the Participant, the Actuarial Equivalent of the remaining certain payments shall be paid in a lump sum to the Participant's surviving Spouse, if any; if none, to the Participant's children who survive him, equally; or if none survive, then to the Participant's estate. If

payments are continued to a Beneficiary and the Beneficiary should then die before a combined total of one hundred twenty (120) monthly benefit payments have been made to the Participant and the Beneficiary, the Actuarial Equivalent of the remaining certain payments shall be paid in a lump sum to the estate of the Beneficiary.

5.02(b) JOINT AND SURVIVOR OPTION

A Participant may elect to receive a decreased retirement benefit during his lifetime and have such decreased retirement benefit (or a designated fraction thereof) continue after his death to his designated Beneficiary, during the lifetime of the Beneficiary. If the

designated Beneficiary is not living at the death of the Participant, no additional benefits shall be payable on behalf of the Participant.

5.02(c) OTHER OPTIONS

With the specific consent of the Plan Administrator and the Trustee, a Participant may elect to receive the Actuarial Equivalent of his retirement benefit in such other manner as he may choose, including a lump sum payment. This election shall only be applicable upon the Participant's actual retirement.

5.03 Maximum Option Payable - In the event a Participant elects to have his retirement benefit paid under Section 5.02(b) and the designated Beneficiary

is not the Spouse of the Participant, the option elected shall be restricted so that the present value of the payments expected to be made to the Participant is fifty percent (50%) or more of the present value of the total payments expected to be made to the Participant and his Beneficiary.

5.04 Automatic Option - Unless a Participant, with the consent of his Spouse, has elected an optional form of payment under Section 5.02 and has not revoked same, or has elected to be excluded from the effects of this automatic option, it shall be automatically assumed that the Participant elected the Joint and Survivor Option of Section 5.02(b) with one-half (1/2) of his amount payable after his death to his designated Beneficiary and with his

Spouse on the effective date of this option designated as his Beneficiary. Such automatic option shall become effective and benefits adjusted accordingly as of the date benefit payments commence.

It is specifically provided that the Spouse of the Participant shall consent in writing to any form of payment other than that provided under this Section 5.04, and such consent shall be witnessed by the Plan Administrator or a notary public. The Plan Administrator may accept an election other than that provided hereunder without the consent of the Spouse if there is no Spouse, the Spouse cannot be located, or such other circumstances as may be prescribed by regulations. Any spousal consent shall only be

applicable to the Spouse granting such consent.

5.05 Payment of Benefits - Unless the Participant otherwise elects under the provisions of the Plan, any payment of benefits to the Participant shall begin not later than sixty (60) days after the close of the Plan Year in which occurs the latest of:

5.05(a) the Participant's reaching his Normal Retirement Age;

5.05(b) the tenth (10th) anniversary of the date the Employee becomes a Participant; and

5.05(c) termination of service of the Participant.

Notwithstanding anything contained herein to the contrary, the entire interest of each Participant or former Participant either:

5.05(d) will be distributed to him not later than the April 1 following the calendar year in which he attains age seventy and one-half (70 1/2) or, in the case of an Employee other than a five percent (5%) owner determined pursuant to IRC Section 416(i)(1)(B), in the calendar year in which he retires, whichever is later, or

5.05(e) will be distributed, commencing no later than such April 1

(i) in accordance with regulations prescribed by the Secretary of Treasury, over the life of such Employee or over the lives

of such Employee and his Beneficiary, or

(ii) in accordance with such regulations, over a period not extending beyond the life expectancy of such Employee or the life expectancies of such Employee and his Beneficiary.

Further, except as provided in Section 5.05(f) following, if an Employee dies before the distribution of the Employee's interest begins pursuant to Section 5.05(e) above, the entire interest of the Employee will be distributed within five (5) years after the death of such Employee.

5.05(f) The immediately preceding sentence shall not be applicable provided:

(i) any portion of the Employee's interest is payable to (or for the benefit of) a designated Beneficiary;

(ii) such portion will be distributed (in accordance with regulations) over the life of such designated Beneficiary (or over a period not extending beyhond the life expectancy of such Beneficiary);

(iii) such distributions begin not later than one (1) year after the date of the Employee's death or such later date as the Secretary of Treasury may by regulation prescribe; or

(iv) the designated Beneficiary

is the surviving Spouse of the Employee and distributions commence on or before the date on which the Employee would have attained age seventy and one-half (70 1/2).

If the surviving Spouse dies before the distribution to such Spouse, this Section 5.05(f) shall be applied as if the surviving Spouse were the Employee.

5.04(g) If distributions have begun and if the Participant dies before his entire interest has been paid to him, then the remainder of the interest will be distributed to his Beneficiary at least as

rapidly as it would have been distributed to the Participant under the method of distribution in effect as of the date of the Participant's death.

5.05(h) For purposes of this Section, the life expectancy of an Employee and the Employee's Spouse (other than in the case of a life annuity) may be redetermined but not more frequently than annually.

5.05(i) Under regulations prescribed by the Secretary of Treasury for purposes of this Section, any amount paid to a child shall be treated as if it had been paid to the surviving

Spouse if such amount will become payable to the surviving Spouse upon such child reaching majority (or other designated event permitted by regulation).

ARTICLE VI

BENEFITS ON DEATH OR TERMINATION OF EMPLOYMENT

6.01 Death After Eligibility for Retirement - In the event of the death of a Participant (a) prior to actual retirement but after having completed the eligibility requirements for normal or early retirement as set forth in Sections 3.01 and 3.03, (b) after attainment of his Normal Retirement Age or (c) who has retired but prior to the commencement of benefit payments, there shall be payable to his Spouse, if any, a

monthly benefit as hereinafter defined.

Said monthly benefit shall be equal to the benefit that would have been payable to the Participant's Spouse upon such Participant's death subsequent to retirement had he survived and retired on the first day of the month coinciding with or next following the date of his death, having elected to have his retirement benefit payable under the Joint and Survivor Option of Section 5.02(b) with one-half (1/2) of his amount payable after his death to his Beneficiary and with his Spouse designated as his Beneficiary. Said monthly benefit shall commence on the assumed date of retirement of the Participant and shall be continued to the Spouse on the first day of each

month thereafter during the lifetime of the Spouse.

6.02 Death of a Vested Participant - Effective for Participants with one (1) or more Hours of Service on or after December 1, 1984, in the event of the death of such active Participant or terminated Participant who has met the service requirement for full or retirement hereunder, there shall be payable to his Spouse, if any, a monthly benefit as hereinafter defined. Death benefits hereunder shall be payable only to the extent that they are not made available pursuant to Section 6.01.

The Participant's Spouse shall receive a monthly benefit based on the Participant's vested Accrued Benefit determined as of the date of the Participant's death which shall be

equal to the monthly benefit that would have been payable to the Participant's Spouse upon the Participant's death subsequent to retirement had he survived and retired on the first day of the month coinciding with or next following the earliest date under the Plan to which he would otherwise be eligible to commence a benefit pursuant to Section 6.04 having elected to have his retirement benefit payable under the Joint and Survivor Option of Section 5.02(b) with one-half (1/2) of such amount payable after his death to his Beneficiary and with his Spouse designated as his Beneficiary. Said monthly retirement benefit shll commence as of the first day of the month coinciding with or next following the first date on which the

Participant would have otherwise been eligible to commence benefits assuming he had survived to such date.

Notwithstanding the preceding, if the Actuarial Equivalent value of a benefit payable to the Spouse is equal to or less than three thousand five hundred dollars ($3,500), the Plan Administrator may direct that such benefit be paid in a lump sum to the Spouse. For purposes of determining the Actuarial Equivalent value of the benefit payable to the Spouse under this paragraph, the Plan may not use an interest rate greater than the interest rate used by the Pension Benefit Guaranty Corporation to value immediate annuities for plans terminating as of the first day of the Plan Year that contains the proposed distribution date. No lump sum

distribution shall be made hereunder after the day of the first period for which an amount is received as an annuity by the Spouse unless the Spouse consents in writing to such distribution.

6.03 Death Subsequent to Retirement - When a retired Participant who is receiving benefits hereunder shall die, his Spouse or Beneficiary shall be entitled to any benefits due under the basic or elected alternate form of payment of his monthly retirement benefit. Should the period of guaranteed payments be exhausted at the death of the retired Participant, no death benefit shall be payable. If a death benefit is payable under any alternate form except that provided in Section 5.04, the Plan Administrator may, in its discretion, elect to pay

the Beneficiary the Actuarial Equivalent value of the outstanding benefits in a single sum.

6.04 Termination of Employment - All rights to all benefits under the Plan will cease upon a Participant's termination of employment with the Employer or Affiliate prior to retirement, other than by death, except as otherwise provided in the following paragraphs of this Sectin 6.04 and in Section 6.02.

If the employment of a Participant is terminated with the Employer or Affiliate prior to retirement, other than by death, but after he has completed at least ten (10) years of Credited Service, he shall receive a monthly retirement benefit determined as hereinbelow provided, commencing on his Normal

Retirement Date, if he is then alive, and paid in accordance with Article V. In all events, a Participant shall be one hundred percent (100%) vested upon the attainment of his Normal Retirement Age.

The amount of monthly retirement benefit payable hereunder shall be determined as the Participant's Accrued Benefit as of his date of termination of employment.

In the event that a Participant entitled to a deferred retirement benefit under the provisions of this Section 6.04 should be later reemployed as an Employee prior to the commencement of such retirement benefit, his rights to any such retirement benefit shall thereupon be suspended, and the Participant's rights to benefits under the Plan

shall be subject to redetermination at any subsequent termination of employment or retirement under the Plan, in accordance with the provisions of the Plan then in effect.

Any amendments to the Plan made subsequent to the termination of employment of any Participant shall in no way affect the amount of retirement benefit to which such Participant is entitled except as otherwise specifically provided herein.

A terminated Participant who has completed at least thirty (30) years of Benefit Accrual Service at his date of termination of employment may elect, by written notice to the Plan Administrator, to have his otherwise deferred monthly retirement benefit commence on the first day of the month prior to his Normal Retirement Date

(but not prior to the date of his termination of employment with the Corporation). The amount of the monthly retirement benefit payable at such earlier commencement date shall be equal to the Actuarial Equivalent of his Accrued Benefit. If the Participant does not elect to commence benefit payments on that date, benefit payments shall commence on what would otherwise be his Normal Retirement Date. Notwithstanding anything contained herein to the contrary, upon a Participant's request, the Plan Administrator, in its sole discretion, may approve the commencement of benefit payments earlier than the Normal Retirement Date.

Notwithstanding any other provisions of this Plan, if (a) the Actuarial Equivalent of a terminated

or retiring Participant's vested benefit, as calculated at his date of severance, is equal to or less than one thousand seven hundred fifty dollars ($1,750) or a lesser amount if such lesser amount is prescribed by regulations of the Secretary of Treasury or (b) the Participant (and his Spouse if spousal consent is required by law) agrees in writing regardless of the amount of such Actuarial Equivalent, the Plan Administrator may direct that the Actuarial Equivalent of his vested benefits, as calculated as of the date of distribution, be paid in a lump sum to such terminated Participant. No other benefits of any type shall be payable to such former Participant or to his Spouse or Beneficiaries. If such terminated or retiring

Participant is subsequently reemployed and again becomes a Participant of his Plan, his Benefit Accrual Service hereunder shall not include any periods of employment prior to his reemployment date unless (a) the amount of such payment is repaid to the Fund, plus interest at five percent (5%) per annum between the date of payment and the date of repayment, (b) such repayment is made prior to the end of a period of five (5) consecutive One Year Breaks in Service and (c) the distribution is made no later than the close of the second (2nd) Plan Year following the Plan Year in which the termination occurs. Such five percent (5%) shall automatically be adjusted to reflect any regulation issued by the Secretary of Treasury changing such interest

rate for mandatory employee contributions. If such amount (plus interest) is repaid, the Participant's Benefit Accrual Service shall be based on all periods of employment subject to any restrictions in Section 1.06.

In the event the distribution was not made by the end of the second (2nd) Plan Year following the Plan Year in which the termination occurred, such prior Benefit Accrual Service shall be included under the Plan with such result reduced by the Accrued Benefit attributable to such prior distribution.

Notwithstanding the preceding, effective December 1, 1985, the one thousand seven hundred fifty dollar ($1,750) amount hereinbefore provided shall be increased to three thousand five hundred dollars ($3,500). For

purposes of determining the Actuarial Equivalent value of the benefit payable hereunder, the Plan may not use an interest rate greater than the interest rate used by the Pension Benefit Guaranty Corporation to value immediate annuities for plans terminating as of the first day of the Plan Year that contains the proposed distribution date.

ARTICLE VII

FUNDING

7.01 Contributions by the Employer - The entire cost of benefits under the Plan shall be borne by the Employer through the Fund. The Employer intends to make its Contributions in such actuarially determined amounts as shall be sufficient to provide the benefits of the Plan and meet the minimum funding standards as required

by law. Funds released through terminations of employment shall be applied to reduce the Employer's future Contributions.

7.02 Trust Fund - On behalf of all Employers, the Corporation will enter into an agreement with the Trustee, whereunder the Trustee will receive, invest and administer as a trust fund all Contributions made under this Plan in accordance with the Trust Agreement. The provisions of such Trust Agreement are incorporated by reference as a part of the Plan, and the rights of all persons hereunder are subject to the terms of the Trust Agreement. The Trust Agreement specifically provides, among other things, for the investment and reinvestment of the Fund and the income thereof, the management of the

Fund, the responsibilities and immunities of the Trustee, removal of the Trustee and appointment of a successor, accounting by the Trustee and the disbursement of the Fund.

The Fund, resulting from Contributions, earnings, profits, increments and accruals thereon, may be used only for the benefit of the Participants, Spouses and Beneficiares, or payment of reasonable expenses of administering the Plan except as provided in Section 9.02 and in Section 12.08.

7.03 Funding Standard Account - The Corporation (who shall be the plan administrator for all Employers in regard to this appointment) shall engage, on behalf of all Participants, an actuary, an insurance company or an actuarial firm which maintains on its

staff at least one (1) person who is recognized by the Secretaries of Labor and Treasury as an enrolled actuary. In addition to performing actuarial valuations and providing actuarial statements as necessary for the annual reports required by the Secretary of Labor, such actuary shall maintain a funding standard account in accordance with rules and regulations as from time to time shall be set forth by the Secretary of Treasury or his delegate. The status of such funding standard account shall be reported on an annual basis to the Employer and such government agencies as may be required.

The actuary, in maintaining the funding standard account, (a) may rely upon any certification or other information relating to employee data,

Fund assets, and Contribution amounts and dates made as provided or caused to be provided the actuary by the Employer, the Trustee, the independent qualified public accountant or any Fiduciary to the extent such reliance is so stated by the actuary in his certification or report; and (b) shall utilize such actuarial assumptions and methods, which in the aggregate, are reasonable taking into account the experience of the Plan and reasonable expectations and which, in combination, offer the actuary's best estimate of anticipated experience under the Plan.

ARTICLE VIII

FIDUCIARIES

8.01 General - Each Fiduciary who is allocated specific duties or responsibilities under the Plan or any

Fiduciary who assumes such a position with the Plan shall discharge his duties solely in the interest of the Participants, Spouses and Beneficiaries and for the exclusive purpose of providing such benefits as stipulated herein to such Participants, Spouses and Beneficiairies, or defraying reasonable expenses of administering the Plan. Each Fiduciary in carrying out such duties and responsibilities shall act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in exercising such authority of duties.

A Fiduciary may serve in more than one Fiduciary capacity and may

employ one or more persons to render advice with regard to his Fiduciary responsibilities. If the Fiduciary is serving as such without compensation, all expenses reasonably incurred by such Fiduciary shall be reimbursed by the Employer or, at the Corporation's direction, from the Fund.

A Fiduciary may allocate any of his responsibilities for the operation and administration of the Plan. In limitation of this right, a Fiduciary may not allocate any responsibilities as contained herein relating to the management or control of the Fund except through the employment of an investment manager as provided in Section 8.03 and in the Trust Agreement.

8.02 Employer Responsibilities - The Employer established and maintains the

Plan for the benefit of its Employees and of necessity retains control of the operation and administration of the Plan. The Employer in accordance with specific provisions of the Plan has, as herein indicated, delegated certain of these rights and obligations to the Corporation, the Trustee and the Plan Administrator and these parties shall be solely responsible for these, and only these, delegated rights and obligations.

The Corporation shall cause periodic actuarial valuations of the Plan to be made which will indicate the amount of Contributions necessary to maintain the Plan on an actuarially sound basis and comply with the minimum funding standards as may be required by law, such actuarial valuation to be made at least once

every three (3) years. The Corporation shall provide the Trustee or an investment manager, if one has been employed as herein provided, with a copy of the results of each actuarial valuation or shall otherwise communicate to the Trustee or investment manager, if applicable, the short and long-range requirements of the Fund, the anticipated level of annual Contributions and any material changes thereto occurring between actuarial valuations.

The Employer shall supply such full and timely information for all matters relating to the Plan as (a) the Plan Administrator, (b) the Trustee, (c) the actuary and (d) the accountant, if any, engaged on behalf of the Plan by the Corporation, may require for the effective discharge of

their respective duties.

8.03 Trustee - The Trustee, in accordance with the Trust Agreement, shall have exclusive authority and discretion to manage and control the Fund, except that the Corporation (who shall be the named Fiduciary for all Employers in regard to this appointment) may in its discretion employ at any time and from time to time an investment manager (as defined in section 3(38) of ERISA) to direct the Trustee with respect to all or a designated portion of the assets comprising the Fund.

8.04 Plan Administrator - As of July 19, 1984, the United States District Court for the Western District of Virginia, Roanoke Division, dissolved the Administrative Committee and appointed the Bankruptcy Trustee as the Plan Administrator.

In accordance with the provisions hereof, the Plan Administrator has been delegated certain administrative functions relating to the Plan with all powers necessary to enable it properly to carry out such duties. The Plan Administrator shall have no power in any way to modify, alter, add to or subtract from, any provisions of the Plan except as may be granted by a court of competent jurisdiction. The Plan Administrator shall have powers to construe the Plan and to determine all questions that may arise thereunder relating to (a) the eligibility of individuals to participate in the Plan, (b) the amount of retirement benefit or other benefits to which any Participant, Spouse or Beneficiary may become entitled hereunder, and (c) any

situation not specifically covered by the provisions of the Plan. All disbursements by the Trustee, except for the ordinary expenses of administration of the Fund or the reimbursement of reasonable expenses at the direction of the Corporation as provided herein, shall be made upon, and in accordance with, the written directions of the Plan Administrator. When the Plan Administrator is required in the performance of its duties hereunder to administer or construe, or to reach a determination, under any of the provisions of the Plan, it shall do so in a uniform, equitable and non-discriminatory basis.

The Plan Administrator shall establish rules and procedures to be followed by the Participants, Spouses

and Beneficiaries in filing applications for benefits and for furnishing and verifying proofs necessary to establish age, years of Credited Service, years of Benefit Accrual Service, Final Average Compensation, Primary Social Security Benefit and any other matters required in order to establish their rights to benefits in accordance with the Plan.

8.05 Claims for Benefits - All claims for benefits under the Plan shall be submitted to the Plan Administrator who shall have the responsibility for determining the eligibility of any Participant, Spouse or Beneficiary for benefits. All claims for benefits shall be made in writing and shall set forth the facts which such Participant, Spouse or Beneficiary believes to be sufficient to entitle

him to the benefit claimed. The Plan Administrator may adopt forms for the submission of claims for benefits in which case all claims for benefits shall be filed on such forms. The Plan Administrator shall provide Participants, Spouses and Beneficiaries with all such forms.

Upon receipt by the Plan Administrator of a claim for benefits, it shall determine all facts which are necessary to establish the right of an applicant to benefits under the provisions of the Plan and the amount thereof as herein provided. The Plan Administrator shall approve, deny and investigate all questionable claims. Upon request, the Plan Administrator will afford any applicant the right of a hearing with respect to any finding of fact or determinatin related to any

claim for benefits under the Plan. In the event any claim for benefits is denied, the Participant, Spouse or Beneficiary shall be notified of such decision in accordance with the provisions of Section 8.06.

8.06 Claims Procedures - The applicant shall be notified in writing of any adverse decision with respect to his claim within ninety (90) days after its submission. The notice shall be written in a manner calculated to be understood by the applicant and shall include:

8.06(a) The specific reason or reasons for the denial;

8.06(b) Specific references to the pertinent Plan provisions on which the denial is based;

8.06(c) A description of any

additional material or information necessary for the applicant to perfect the claim and an explanation why such material or information is necessary; and

8.06(d) An explanation of the Plan's claim review procedures.

If special circumstances require an extension of time for processing the initial claim, a written notice of the extension and the reason therefor shall be furnished to the claimant before the end of the initial ninety (90) day period. In no event shall such extension exceed ninety (90) days.

In the event a claim for benefits is denied or if the applicant has had

no response to such claim within ninety (90) days of its submission (in which case the claim for benefits shall be deemed to have been denied), the applicant or his duly authorized representative, at the applicant's sole expense, may appeal the denial to the Plan Administrator within sixty (60) days of the receipt of written notice of the denial or sixty (60) days from the date such claim is deemed to be denied. In pursuing such appeal the applicant or his duly authorized representative:

8.06(e) may request in writing that the Plan Administrator review the denial;

8.06(f) may review pertinent documents; and

8.06(g) may submit issues and comments in writing.

The decision on review shall be made within sixty (60) days of receipt of the request for review, unless special circumstances require an extension of time for processing, in which case a decision shall be rendered as soon as possible, but not later than one hundred twenty (120) days after receipt of the request for review. If such an extension of time is required, written notice of the extension shall be furnished to the claimant before the end of the original sixty (60) day period. The decision on review shall be made in writing, shall be written in a manner calculated to be understood by the claimant, and shall include specific references to the provisions of the Plan on which the denial is based. If the decision on review is not

furnished within the time specified above, the claim shall be deemed denied on review.

8.07 Records - All acts and determinations of the Plan Administrator shall be duly recorded and all such records, together with such other documents as may be necessary in exercising its duties under the Plan shall be preserved in the custody of the Plan Administrator. Such records and documents shall at all times be open for inspection to, and for the purpose of making copies by, any person designated by the Corporation. The Plan Administrator shall provide such timely information, resulting from the application of its responsibilities under the Plan, as needed by (a) the Trustee, (b) the actuary and (c) the accountant, if any, engaged on behalf

of the Plan by the Corporation, for the effective discharge of their respective duties.

8.08 Missing Persons - The Plan Administrator shall direct the Trustee to make a reasonable effort to locate all persons entitled to benefits under the Plan; however, notwithstanding any provision in the Plan to the contrary, if, after a period of five (5) years from the date such benefit shall be due, any such persons entitled to benefits have not been located, their rights under the Plan shall stand suspended. Before this provision becomes operative, the Trustee shall send a certified letter to all such persons at their last known address advising them that their interest or benefits under the Plan shall be suspended. Any such suspended amounts

shall be held by the Trustee for a period of three (3) additional years (or a total of eight (8) years from the time the benefits first become payable). Provided, however, that if a person subsequently makes a valid claim with respect to such suspended benefits, his right to benefits shall be reinstated.

ARTICLE IX

AMENDMENT AND TERMINATION OF THE PLAN

9.01 Amendment of the Plan - The Corporation shall have the right at any time by action of the Board to modify, alter or amend the Plan in whole or in part; provided, however, that the duties, powers and liabilities of the Trustee hereunder shall not be increased without its written consent; and provided, further, that the amount of benefits

which at the time of any such modification, alteration or amendment shall have accrued for any Participant, Spouse or Beneficiary hereunder shall not be adversely affected thereby; and provided, further, that no such amendment shall have the effect of revesting in the Employer any part of the principal or income of the Fund.

9.02 Termination of the Plan - The Employer expects to continue the Plan indefinitely, but continuance is not assumed as a contractual obligation and each Employer reserves the right at any time by action of its board of directors to terminate the Plan as applicable to itself. If the Employer terminates or partially terminates the Plan, or it is otherwise terminated or partially terminated, the rights of

the Participants affected thereby to benefits then accrued shall be nonforfeitable and the Trustee shall continue to administer the Fund as instructed by the Plan Administrator in accordance with the provisions hereof, and the expenses of the Trustee shall be paid out of the assets then remaining in the Fund. Notwithstanding the above, no Participant shall have any recourse toward the satisfaction of his Accrued Benefit from other than assets of the Plan or the Pension Benefit Guaranty Corporation (PBGC) if there shall be a PBGC liability present.

In the event of termination of the Plan as provided in this Article IX, the Plan Administrator shall determine the equitable share of the Fund with respect to any Employer for

whom the Plan has terminated. The administration of that portion of the Fund applicable to any Employer for which the Plan has not been terminated shall be unaffected and any references hereinafter contained in this Article IX to the Fund shall refer only to that portion applicable to the Employer for whom the Plan has terminated. Reasonable expenses incurred by the Plan Administrator in the termination of the Plan shall be payable from the Fund unless paid directly to such Employer.

The Plan Administrator shall allocate and administer the Fund to provide benefits for the Participants on the date of termination and any Spouses or Beneficiaries then receiving benefits in accordance with Article V. Such allocation of the

Fund shall be made in the order of precedence indicated and in the amounts indicated in Section 4044 of ERISA as said Section may be amended, according to principles set forth in said Section and such other portions of said Act as it incorporates by reference. For the purpose of making such allocation any regulations issued pursuant to that Section shall be deemed part of such Section.

The allocation of that portion of the Fund computed above shall be based on the method of payment of monthly retirement benefits or death benefits as specified in the Plan. In the event that Fund assets on or after the date of termination are insufficient to fund all benefits within any class, the benefits of all higher order of precedence shall be funded, the

benefits of all lower order of precedence shall be unfunded, and the assets remaining shall be allocated among members of that class on the basis of their respective actuarial reserves, subject to the provisions of Section 4044 of ERISA.

In the event of failure of an Employer upon termination of its participation in this Plan to pay or to reimburse the Trustee, the actuary, accountant or attorney for the outstanding charges or expenses incurred hereunder, the Trustee is empowered to satisfy such claims by lien upon that portion of the Fund attributable to that Employer, prior to making any allocation to Participants, vested terminated Participants, retired Participants, disabled Participants, Spouses and

Beneficiaries of the Plan in accordance with this Article IX.

The application of the Fund on the foregoing basis shall be calculated by the actuary and certified to the Trustee by the Plan Administrator as of the date on which the Plan terminated. Subject to the restrictions of ERISA, as it may be amended, when the calculations shall be completed, the interest of each Participant, vested terminated Participant, retired Participant, disabled Participant, Spouse and Beneficiary shall continue to be held in the Fund pursuant to the terms of this Article IX, or, at the direction of the Plan Administrator, the appropriate portion of the Fund shall be liquidated and each of their interests distributed to them in the

form of annuity contracts, annuity payments, installments or in a lump sum as determined by the Plan Administrator; provided, however, that any funds remaining after the satisfaction of all liabilities to such Participants, vested terminated Participants, retired Participants, disabled Participants, Spouses and Beneficiaries under this Plan due to erroneous actuarial computation or assumptions shall be returned to the appropriate Employer.

9.03 Twenty-five (25) Highest Paid Limitation - In the event that the Plan is terminated or a lump sum distribution is made to a Participant who is one of the Twenty-five (25) Highest Paid Employees at any time before the Expiration Date, the following rules shall apply:

9.03(a) Upon the occurrence of either of the above conditions, the Basic Benefit and any Additional Benefit which may be provided from Contributions by the Employer for any of its Twenty-five (25) Highest Paid Employees shall not be greater than the amount of benefits which can be provided by the larger of the following amounts prior to the satisfaction of all Plan liabilities relating to other Plan Participants to whom this Section 9.03 does not apply:

9.03(a)(i) Twenty thousand dollars ($20,000).

9.03(a)(ii) An amount equal to twenty percent (20%) of the first fifty thousand dollars ($50,000) of the Employee's average annual compensation for the preceding five (5) years multiplied by the number of years since the Revision Date, as hereinafter defined.

9.03(a)(iii) With respect to a substantial Owner, the dollar amount which equals the Actuarial Equivalent of the benefit guaranteed for such affected Participant under Section 4022 of ERISA, or if the Plan has not terminated, the Actuarial Equivalent of the benefit that would be

guaranteed if the Plan terminated on the date the benefit commences, determined in accordance with regulations of the Pension Benefit Guaranty Corporation (PBGC).

With respect to Participants other than Substantial Owners, the dollar amount which equals the Actuarial Equivalent of the maximum benefit described in Section 4022(b)(3)(B) of ERISA (determined on the date the Plan terminates or on the date benefits are distributed, as if the Plan terminated, whichever is earlier and determined in

accordance with PBGC regulations) without regard to any other limitation in Section 4022 of ERISA.

9.03(b) The provisions of Section 9.03(a) shall not restrict the current payment of full retirement benefits called for by the Plan for any retired Employee while the Plan is in full effect. In the event that any funds are realized by operation of the restrictions set forth in Section 9.03(a), they shall be used to reduce subsequent Contributions by the Employer or if the Employer has ceased its Contributions, they shall

be used for the benefit of Employees other than those restricted by Section 9.03(a) on a basis which shall not result in substantial discrimination in favor of the more highly-compensated Employees, but subject to any reversion of assets on Plan termination pursuant to Section 9.02;

9.03(c) For purposes of this Section 9.03, the following definitions shall apply:

9.03(c)(i) "Additional Benefits" - the benefits provided by the Plan which are over and above those which would have been provided by the provisions of the Plan in

effect prior to the applicable Revision Date had the Plan been continued without changes;

9.03(c)(ii) "Basic Benefit" - the benefit initially provided by the Plan less any Additional Benefits;

9.03(c)(iii) "Expiration Date" - the tenth (10th) anniversary of any Revision Date;

9.03(c)(iv) "Revision Date" - the effective date of adoption of the Plan by the Employer or the effective date of any amendment to the Plan which increases the benefits;

9.03(c)(v) "Substantial Owner" - a Participant defined in Section 4022(b)(5) of

ERISA; and

9.03(c)(vi) "Twenty-five (25) Highest Paid Employees" - the twenty-five (25) highest paid Employees of the Employer as of the applicable Revision Date, excluding, however, any Employee whose anticipated annual benefits are not expected to exceed fifteen hundred dollars ($1,500).

9.03(d) If, during the first ten (10) years after a Revision Date, any benefit is to be distributed to a Participant to whom this Section 9.03 is applicable in a lump sum (the amount of which represents the lump sum Actuarial

Equivalent of the retirement benefit to which the Participant otherwise would be entitled to receive as the normal form of pension), the Participant, prior to the payment of such lump sum, shall enter into an agreement with the Employer. This agreement shall be in accordance with requirements prescribed by the Plan Administrator, Revenue Ruling 81-135 and any rulings or regulations amendatory thereof, including provisions that the Participant (or in the event of his daeth, his estate) will repay to the

Fund a sum, as determined by the actuary, equal to the Actuarial Equivalent of the amounts by which the Participant's monthly retirement benefit under the Plan would have been decreased during his then remaining lifetime in accordance with this Section 9.03, and secure such obligations to repay in the event the limitations contained in this Sectin 9.03 become effective. The agreement shall further require the Participant, promptly after the distribution to him of the lump sum payment under the Plan, to deposit as

security with a depositary, satisfactory to the Employer and the Plan Administrator, property real or personal, having a market value, as determined by the depositary, as of the date of deposit at least equal to one hundred twenty-five percent (125%) of the amount which would be repayable if the Plan had terminated on the date of distribution of such lump sum. In the event that the market value, as determined by the depositary, of such property falls below one hundred ten percent (110%) of the amount as determined

by the actuary, which would have been repayable to the Fund, the Participant shall deposit with the depositary additional properties so as to render the total market value, as determined by the depositary, of the security deposited equal to one hundred twenty-five percent (125%) of the amount which would have been repayable as determined by the actuary. If the conditions of this Section 9.03(d) are met for the ten (10) year period following such Revision Date, and the Plan is not terminated, such property deposited as security in the Fund shall

be redelivered to such Participant.

9.03(e) The provisions of this Section 9.03 apply to former or retired Participants, as well as to Participants in active service.

9.03(f) In the event that it should be determined by statute, court decision in which the Internal Revenue Service acquiesces, ruling by the Internal Revenue Service, or otherwise, that the provisions of this Section 9.03 are no longer necessary to qualify the Plan under the IRC, this Section 9.03 shall be ineffective without

amendment to the Plan.

ARTICLE X

PROVISIONS RELATIVE TO EMPLOYERS INCLUDED IN PLAN

10.01 Method of Participation - Any corporation which is a member of the same controlled group of corporations as the Corporation, with the approval of the Board, by taking appropriate board action may become a party to the Plan, by adopting the Plan as a retirement plan for its Employees. Any corporation which becomes a party to the Plan shall thereafter promptly deliver to the Trustee under the Trust Agreement provided for in Article VII a certified copy of the resolutions or other documents evidencing its adoption of the Plan and also a written instrument showing the Board's approval of such corporation's

becoming a party to the Plan. This Plan shall be construed as a single Plan for all participating Employers.

10.02 Withdrawal - Any one or more of the Employers included in the Plan may withdraw from the Plan at any time by giving six (6) months advance notice in writing of its or their intention to withdraw to the Board and the Plan Administrator (unless a shorter notice shall be agreed to by the Board).

Upon receipt of notice of any such withdrawal, the Plan Administrator shall certify to the Trustee the equitable share of such withdrawing Employer in the Fund (to be determined by the actuary employed on behalf of the Plan by the Corporation), and the Trustee shall thereupon set aside from the Fund then held by it such securities and other

property as it shall, in its sole discretion, deem to be equal in value to such equitable share. If the Plan is to be terminated with respect to such Employer, the amount set aside shall be dealt with in accordance with the provisions of Section 9.02. If the Plan is not to be terminated with respect to such Employer, the Trustee shall turn over such amount to the trustee as may be designated by such withdrawing Employer, and such securities and other property shall thereafter be held and invested as a separate retirement trust of the Employer which has so withdrawn, and shall be used and applied according to the terms of a new agreement and declaration of trust between the Employer so withdrawing and the trustee so designated.

Neither the segregation of the Fund assets upon the withdrawal of an Employer, nor the execution of a new agreement and declaration of trust pursuant to any of the provisions of this Section 10.02, shall operate to permit any part of the corpus or income of the Fund to be used for or diverted to purposes other than for the benefit of Participants, Spouses and Beneficiaries (including the payment of reasonable expenses of administering the Plan), except as may be otherwise provided in Section 9.02 and Section 12.08.

ARTICLE XI

TOP HEAVY PLAN PROVISIONS

11.01 General - Notwithstanding anything contained herein to the contrary, in the event that this Plan when combined with all other plans required to be

aggregated pursuant to IRC Section 416(g) is deemed to be a Top Heavy Plan for any Plan Year, the following conditions shall become operative.

11.02 Vesting - In the event that vesting schedule provided in Section 6.04 is less liberal than the vesting schedule hereinafter provided, then such vesting schedule shall be substituted with the following for each Participant with an Hour of Service after the Plan becomes a Top Heavy Plan and such schedule shall remain in effect in all future Plan Years.

Years of Credited Service	Vested Percentages
Less than 2 years	0%
2 years but less than 3 years	20%
3 years but less than 4 years	40%
4 years but less than 5 years	60%
5 years but less than 6 years	80%

6 years or more	100%

11.03 Minimum Benefits - For the first Plan Year commencing on or after January 1, 1984, that the Plan shall be deemed a Top Heavy Plan, and any Plan Year thereafter in which the Plan is a Top Heavy Plan, there shall be a minimum annual Accrued Benefit applicable to all non-Key Employees who are Partcipants equal to the lesser of two percent (2%) of Top Heavy Compensation multiplied by the Participant's number of years of Top Heavy Service or twenty percent (20%) of his Top Heavy Compensation.

11.04 Definitions - For purposes of this Article XI, the following definitions shall be applicable.

11.04(a) "Top Heavy Compensation" means his average annual Full Compensation during that period

of five (5) consecutive Testing Years for which his aggregate Full Compensation was the greatest. If he shall have fewer than five (5) consecutive Testing Years, his Top Heavy Compensation shall mean his average annual Full Compensation during that period containing the largest number of consecutive Testing Years; provided that, if there shall be more than one such period, Top Heavy Compensation shall be calculated on the basis of such period for which such average is the greatest.

11.04(b) "Testing Year" means a Plan Year which (1) constitutes a year of Benefit Accrual Service for such Participant and (2)

begins prior to the end of the last Plan Year for which the Plan was a Top Heavy Plan. Except to the extent excluded under the preceding sentence, Plan Years beginning before 1984 shall be Testing Years.

11.04(c) "Full Compensation" means, for any Employee for any Plan Year, his compensation [as such term is defined in Section 4.07(b)] from the Employer or Affiliate for such Plan Year except that Full Compensation for any Plan Year in which the Plan is deemed to be a Top Heavy Plan shall not exceed two hundred thousand dollars ($200,000) or such greater amount as may be determined by the Secretary of Treasury

pursuant to IRC Section 416(d)(2).

11.04(d) "Top Heavy Service" means a year of Benefit Accrual Service in which the Plan is deemed to be a Top Heavy Plan with the exception that Benefit Accrual Service prior to January 1, 1984, shall be excluded.

11.05 Multiple Plan Participation - In the event the Plan is deemed to be a Top Heavy Plan for the Plan Year, then the multiplier of 1.25 in Section 4.08(a) and Section 4.08(c) shall be reduced to 1.0 unless

(i) All plans required to be aggregated and any other plans which may be permissively aggregated pursuant to IRC Section 416(g) are ninety percent (90%) or less top heavy,

and

(ii) The minimum accrued benefit referenced in IRC Section 416(c)(1) is modified by substituting in Section 11.03 three percent (3%) for two percent (2%) and by increasing twenty percent (20%) by one (1) percentage point for each year of Top Heavy Service (but not by more than ten (10) percentage points).

11.06 No Duplication of Minimum Benefit - With respect to the operation of these Top Heavy Plan provisions, there shall be no requirement that the entire defined benefit minimum benefit and the defined contribution minimum contribution be provided. To the extent that there shall be a defined benefit-Accrued Benefit, it shall be

controlling. To the extent that there shall be an Employer contribution to a Defined Contribution Plan, then there shall be a determination as to whether the defined contribution amount is comparable to the difference between the defined benefit minimum benefit and the minimum defined benefit accrued benefit required under IRC Section 416. In the event that the defined contribution amount shall not be comparable, then the difference shall be provided in the Defined Benefit Plan unless the next sentence shall apply. Notwithstanding the above, if there shall be a contribution to the Defined Contribution Plan of at least seven and one-half percent (7 1/2%) of compensation to non-Key Employees, it shall be conclusively presumed that

the minimum benefit and/or contribution rquirements of Top Heavy Plans have been met.

11.07 Actuarial Assumptions - For purposes of determining whether a Defined Benefit Plan is a Top Heavy Plan, calculations shall be based upon The UP-1984 Table of Mortality at six percent (6%) interest with such determination being made on the valuation date which occurs within the Plan Year. In the event more than one (1) plan is being used for Top Heavy Plan testing, the same actuarial assumptions shall be used for all such plans. Further, pursuant to Internal Revenue Service Regulation 1.416-1, T-26 and T-27, proportional subsidies shall be ignored and non-proportional subsidies shall be considered.

MISCELLANEOUS

12.01 Governing Law - The Plan shall be construed, regulated and administered according to the laws of the State of Virginia except in those areas preempted by the laws of the United States of America.

12.02 Construction - The headings and subheadings in the Plan have been inserted for convenience of reference only and shall not affect the construction of the provisions hereof. In any necessary construction the masculine shall include the feminine and the singular the plural, and vice versa.

12.03 No Employment Contract - This Plan shall not be deemed to constitute a contract between the Employer and any Participant or to be a consideration or inducement for the employment of

any Participant or employee. No Participant in the Plan shall acquire any right to be retained in the Employer's employ by virtue of the Plan, nor, upon his dismissal or upon his voluntary termination of employment, shall he have any right or interest in and to the Fund other than as specifically provided herein. Except to the extent required by law, the Employer shall not be liable for the payment of any benefit provided for herein; all benefits hereunder shall be payable only from the Fund, and only to the extent that the Fund is sufficient therefor.

12.04 Receipt Prior to Payment - The Trustee, the Plan Administrator, or the Employer, jointly or severally, may, but need not, require a written receipt as a condition precedent to

any payment called for by the Plan to be made to a Participant, Spouse, Beneficiary, or to their heirs, successors, executors and legal representatives.

12.05 Payment to Minors and Incompetents - Should any Participant, Spouse or Beneficiary be a minor or in the judgment of the Plan Administrator, be physically or mentally incapable of personally receiving and giving a valid receipt for any payment due him under the Plan, the Plan Administrator may make such payment or any part thereof to or for the benefit of such Participant, Spouse or Beneficiary, or directly to or for the benefit of any person determined by the Plan Administrator to have incurred expense or assumed responsibility for the expenses of such Participant, Spouse

or Beneficiary.

12.06 Non-alienability of Benefits - Except as provided in IRC Section 401(a)(13)(B) related to qualified domestic relations orders, no benefits or other amounts payable unde the Plan shall be subject in any manner to anticipation, sale, transfer, assignment, pledge, encumbrance, charge or alienation.

12.07 Merger of Plans - In the event of the merger or consolidation of the Plan with another plan or transfer of assets or liabilities from the Plan to another plan, each then Participant shall not, as a result of such event, be entitled on the day following such merger, consolidation or transfer under the termination of Plan provisions to a lesser benefit than the benefit he was entitled to on the

date prior to the merger, consolidation or transfer if the Plan had been terminated.

12.08 Mistake of Fact - Notwithstanding anything herein to the contrary, upon the Employer's request, a Contribution which was made by a mistake of fact, or conditioned upon initial qualification of the Plan or upon the deductibility of the Contribution under IRC Section 404, shall be returned to the Employer by the Trustee within one (1) year after the payment of the Contribution, the denial of the qualification or the disallowance of the deduction (to the extent disallowed), whichever is applicable. The portion of any Contribution which is to be returned to the Employer pursuant to this Section 12.08 must be reduced by its

proportionate share of losses and expenses of the Fund, if any, but shall not be increased by any income or gains of the Fund, if any.

12.09 Exclusive Benefit - The Employer shall be entitled to no part of the corpus or income of the Fund and no part thereof shall be used for or diverted to purposes other than for the exclusive benefit of Participants, Spouses and Beneficiaries hereunder except as provided in Section 9.02 and in Section 12.08.

12.10 Indemnification - The Employer shall indemnify and hold harmless each person or persons who may serve as the Plan Administrator from any and all claims, loss, damages, expense (including attorney's fees), and liability (including any amounts paid in settlement) arising from any act or

omission of such member, except when the same is judicially determined to be due to the gross negligence or willful misconduct of such member. No Plan assets may be used for any such indemnification.

12.11 Small Payments - If the Actuarial Equivalent of the retirement benefit payable to a Participant at retirement is less than three thousand five hundred dollars ($3,500), the Plan Administrator, at its discretion, may direct that benefit payments be made in a lump sum in lieu of periodic payments. For purposes of determining the Actuarial Equivalent value of the benefit payable hereunder, the Plan may not use an interest rate greater than the interest rate used by the Pension Benefit Guaranty Corporation to value immediate annuities for plans

terminating as of the first day of the Plan Year that contains the proposed distribution date.

12.12 Counterparts - The Plan and the Trust Agreement may be executed in any number of counterparts, each of which shall constitute but one and the same instrument and may be sufficiently evidenced by any one counterpart.

ARTICLE XIII

ADOPTION OF PLAN

Anything herein to the contrary notwithstanding, this Plan is amended and maintained under the condition that it shall continue to be approved and qualified by the Internal Revenue Service under IRC Section 401(a) and that the Trust hereunder is exempt under IRC Section 501(a), or under any comparable Sections of any future legislation which amends, supplements or supersedes such Sections. In the event

that it should be found by the Internal Revenue Service that the Plan as amended and restated hereby is not qualified, the Corporation may modify the Plan to meet Internal Revenue Service requirements or reinstate the Plan as in effect prior to such amendment and restatement.

As evidence of its adoption of the Plan, Coleman Furniture Corporation has caused this instrument to be signed by its duly authorized officers and its corporate seal to be affixed hereto this /s/ 1st day of /s/ December, 19/s/87.

COLEMAN FURNITURE CORPORATION

By: /s/ Roy V. Creasy
(Title)
/s/ Trustee in Bankruptcy

ATTEST:

By /s/ Kelly J. Weeks

APPENDIX

The term "Actuarial Equivalent" pursuant to Section 1.02 shall be based

upon the following:

Interest: (a) For lump sum payments, seven and one-half percent (7 1/2%)

(b) For all other purposes, six percent (6%)

Mortality: 1971 Group Annuity Mortality Table for males set back one (1) year for Participants and set back five (5) years for beneficiaries.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Roanoke Division

IN RE:	
COLEMAN FURNITURE CORP.	Bankruptcy No. 72-82-01410
Debtor	
NCNB FINANCIAL SERVICES, INC.	
Plaintiff	
v.	
ROY V. CREASY, TRUSTEE FOR COLEMAN FURNITURE CORP.,	Civil Action No. 86-0432
Defendants	
ROY V. CREASY, TRUSTEE FOR COLEMAN FURNITURE CORP., DEBTOR	
Counterclaimant	
v.	AFFIDAVIT
NCNB FINANCIAL SERVICES, INC. and NCNB NATIONAL BANK OF NORTH CAROLINA	
Counter-Defendants	

Comes now Roy V. Creasy, Trustee in Bankruptcy for Coleman Furniture

Corporation, relative to information sought by Steven Agee as concerns that certain law suit styled Creasy vs. Coleman Furniture Corporation Pension Plan, United States District Court # 86-0272-R.

Under oath I answer the following questions:

(1) Total plan assets: The total plan assets as of December 2, 1987 were $816,437.76.

(2) Description of what this total includes: The amount listed in Item 1 above is the balance in the trust fund at Signet Trust Company as of December 2, 1987. This is the balance after lump sum distributions were made or annuity contracts were purchased for all participants except Mr. Shumate, and administrative expenses through June, 1987 were paid.

(3) The amount paid into the Court

under the agreed Order for Shumate: $250,000.

(4) Approximate expenses to close out the plan: $50,000. This figure of $50,000 includes $32,000 of expenses which have been identified to date and estimated additional expenses including legal fees, actuarial fees, storage fees, PBGC filing fees, costs for preparation of annual reports, and prepayment of legal fees to answer questions which will probably come from participants or former employees in the next several years.

(5) The amount already paid or committed for all participants except Shumate: $568,822.48.

(6) Approximate reversion to Creasy, Trustee in Bankruptcy: $515,000 subject to potential claims of unaccrued benefits to participants.

(7) Also attached are copies of the

1963, 1976, and 1984 versions of the Pension Plan.

Subscribed and sworn to before me this 15th day of December, 1987, by Roy V. Creasy, Trustee in Bankruptcy.

/s/ Kelly J. Weeks
Notary Public

My Commission expires:

/s/ October 29, 1991

PETITIONER'S

BRIEF

No. 91-913

In The Supreme Court Of The United States

OCTOBER TERM, 1991

JOHN R. PATTERSON, TRUSTEE,

Petitioner,

v.

JOSEPH B. SHUMATE, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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Counsel for Respondent

PETITION FOR CERTIORARI FILED NOVEMBER 8, 1991

CERTIORARI GRANTED JANUARY 21, 1992

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

QUESTIONS PRESENTED

1. Does "applicable nonbankruptcy law" in 11 U.S.C. § 541(c)(2) include ERISA, 29 U.S.C. § 1056(d)(1), or is that term limited to state spendthrift trust law?

2. Does "property exempt under Federal law" in 11 U.S.C. § 522(b)(2) include a bankruptcy debtor's interest in a qualified retirement plan under 29 U.S.C. § 1056(d)(1)?

3. If 29 U.S.C. § 1056(d)(1) creates either a federal exemption under 11 U.S.C. § 522(b)(2) or is "applicable nonbankruptcy law" under 11 U.S.C. § 541(c)(2), does an enforceable public policy exist barring a bankruptcy debtor from sheltering his interest in a qualified retirement plan over which the debtor held significant dominion, control and revocation powers?

LIST OF PARTIES

The Petitioner is John R. Patterson, Trustee in Bankruptcy for Joseph B. Shumate, Jr. The Respondent is Joseph B. Shumate, Jr.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

No. 91-913

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHN R. PATTERSON, TRUSTEE, *Petitioner*,

v.

JOSEPH B. SHUMATE, JR., *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at 943 F.2d 362. Petition Appendix 1a-17a (hereinafter Pet. App.). The opinion of the district court (Pet. App. 18a-46a) is reported at 83 B.R. 404.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-17a) was entered on August 12, 1991. The Petition for a Writ of Certiorari was filed on November 8, 1991, and was granted on January 21, 1992. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. 11 U.S.C. § 522(b)(2)(A), (Pet. App. 60a);

2. 11 U.S.C. § 541(c)(2), (Pet. App. 61a);

3. 26 U.S.C. § 401(a)(13)(A), (Pet.

App. 62a);

4. 29 U.S.C. § 1056(d)(1), (Pet. App. 63a);

5. 29 U.S.C. § 1144(d), (Pet. App. 64a); and

6. 11 U.S.C. § 522(d)(10)(E).

> (d) The following property may be exempted under subsection (b)(1) of this section:
>
> (10) The debtor's right to receive -- ...
>
> (E) a payment under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless--

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. § 401(a), 403(b), 408, or 409).

STATEMENT OF THE CASE

Joseph B. Shumate, Jr., (Shumate), the Respondent, was Chairman of the Board of Directors, President, and the majority shareholder of Coleman Furniture Corporation (CFC) from 1978 to February,

1983. Joint Appendix 119-123, Vol. I, (hereinafter J.A.). He controlled at least 96% of the issued and outstanding CFC stock, owning 54% of CFC stock outright and controlling another 42% through a revocable trust, of which he was settlor and trustee. Shumate eventually revoked the trust to own 96% of CFC stock outright. (J.A. 123, Vol. I).

In order to gain control of the majority of CFC stock in 1978, Shumate caused CFC to make a loan agreement with NCNB Financial Services, Inc., (NCNB) to finance the leveraged buyout of CFC stock held by other stockholders. (Pet. App. 38a). Shumate personally guaranteed NCNB's loan to CFC. The NCNB loan agreement with CFC contained a covenant limiting annual dividends to $50,000.00. (Pet. App. 39a).

As CFC's majority stockholder, Shumate could replace the CFC Board of

Directors at will. (J.A. 157, Vol. I). The CFC Board of Directors could terminate the Coleman Furniture Corporation Pension Plan (CFC Plan) at will without cause. (J.A. 157, Vol. I, and 475, Vol. II). At trial, the district court found "therefore, Shumate could have terminated the plan at any time before the bankruptcy and received not only his pension interest, but any excess funds not needed to satisfy the rights of other participants." (Pet. App. 23a). Shumate "could have paid himself the reversion of any overfunded amount as a dividend on his stock." (Pet. App. 37a).

CFC filed for bankruptcy under Chapter 11 of the Bankruptcy Code in November, 1982. Roy V. Creasy (Creasy) was appointed bankruptcy trustee for CFC in February, 1983, when CFC's case was converted to a Chapter 7 proceeding.

Shumate filed for Chapter 11

protection on June 1, 1984, which was converted to a Chapter 7 proceeding on August 24, 1984. John R. Patterson, the Petitioner (the Trustee), was then appointed trustee in bankruptcy for the Shumate bankruptcy estate.

In addition to his duties as trustee in bankruptcy for CFC, Creasy was appointed Plan Administrator of the CFC Plan. CFC established the CFC Plan in 1963 and maintained it as a qualified retirement plan under § 401(a) of the Internal Revenue Code. The CFC Plan contained the antialienation clause required by 26 U.S.C. § 401(a)(13)(A) and 29 U.S.C. § 1056(d)(1).

Creasy brought a district court action culminating in court approval to terminate the CFC Plan. See Creasy v. Coleman Furniture Corporation, 763 F.2d 656 (4th Cir. 1985). Of approximately 400 CFC Plan participants, all except Shumate have

received final termination distributions from Creasy. (Pet. App. 4a). Upon satisfying all payments to plan participants, the surplus in the CFC Plan (commonly called a plan reversion) was paid to the CFC bankruptcy estate.

The Trustee, pursuant to 11 U.S.C. § 542, filed an Adversary Proceeding in the United States Bankruptcy Court on April 24, 1987, for the turnover of Shumate's CFC Plan benefits to his bankruptcy estate. Shumate responded by filing a motion in an existing United States District Court civil action concerning the CFC Plan, to compel Creasy to pay the benefits over to him. The Trustee intervened in this action, into which the Adversary Proceeding was consolidated, and the district court heard all matters relating to Shumate's CFC Plan interest.

Shumate, Creasy, and the Trustee

entered into an Agreed Order dated December 3, 1987, fixing Shumate's CFC Plan interest at $250,000.00. (J.A. 92, Vol. I). Creasy then paid the funds to the Clerk of the district court to hold in an interest bearing account.

The Trustee argued at trial that Shumate's CFC Plan interest was property of the bankruptcy estate under the broad reach of 11 U.S.C. § 541(a): "all legal and equitable interests of the debtor in property." Shumate contended the CFC Plan interest was excluded from § 541(a)[1] estate property because the CFC Plan's antialienation provision invoked the Employment Retirement Income Security Act of 1974 (ERISA) as an applicable nonbankruptcy law restriction on transfer

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[1]All statutory references hereinafter are to Title 11 of the United States Code (the Bankruptcy Code) unless noted otherwise.

under § 541(c)(2). In the alternative, Shumate contended the CFC Plan interest was exempt from the Trustee's reach under § 522(b)(2)(A), claiming ERISA as a federal exemption.

The district court, interpreting Fourth Circuit precedent, held that applicable nonbankruptcy law means state law (Pet. App. 26a) and not a broad reference to other law such as ERISA. The district court reviewed Virginia spendthrift trust law and determined such trusts are invalidated as to a debtor who exercises control over the trust because he is, in effect, both settlor and beneficiary by virtue of the power to terminate the trust. (Pet. App. 35a, 36a).

Due to Shumate's pervasive control and revocation power over the CFC Plan and his interest in it, the court concluded he was effectively settlor and beneficiary and

without spendthrift trust protection. Accordingly, the district court held Shumate's pension interest was not excluded from the bankruptcy estate under § 541(c)(2). (Pet. App. 38a).

The district court also determined that the antialienation clause in the CFC Plan did not create an ERISA exemption under § 522(b)(2). Finding Virginia had opted out of the Bankruptcy Code's federal exemption scheme in § 522(d), the district court followed a line of court of appeals decisions holding ERISA was not intended by Congress to be a "federal exemption" under § 522(b)(2). (Pet. App. 42a - 44a).

The Fourth Circuit, in a decision dated August 12, 1991, held that "applicable nonbankruptcy law" under § 541(c)(2) does include ERISA and reversed the district court. Citing Anderson v. Raine (In Re Moore), 907 F.2d

1476 (4th Cir. 1990) as authority, the court of appeals ruled that the antialienation language required by 29 U.S.C. § 1056(d)(1) in a qualified pension plan like the CFC Plan, is applicable nonbankruptcy law which excludes Shumate's pension interest from his bankruptcy estate. In the Fourth Circuit's view, there was no public policy exception to this ERISA protection regardless of the degree of control a debtor may have over his retirement plan interest. (Pet. App. 11a, 12a). Having found the controlling role of ERISA as applicable nonbankruptcy law under § 541(c)(2) to exclude a debtor's pension interest from his bankruptcy estate, the Fourth Circuit did not reach the question of whether ERISA creates an exemption in bankruptcy under § 522(b)(2)(A).

SUMMARY OF ARGUMENT

This case is before the Court to resolve whether a debtor in bankruptcy, with control over and the power to revoke a pension plan, can exclude or exempt his interest in such a plan from his bankruptcy estate.

The Fourth Circuit reads applicable nonbankruptcy law in § 541(c)(2) to cover all laws, including ERISA, so as to exclude a debtor's pension benefits from his bankruptcy estate without reference to the Bankruptcy Code's exemption provision, § 522. This interpretation ignores the plain language of § 522(d)(10)(E) and has the effect of writing that section out of the Bankruptcy Code.

Applicable nonbankruptcy law in § 541(c)(2) is more appropriately limited to state spendthrift trust law. Neither § 541 or its legislative history reference an ERISA exclusion for pension benefits from

the bankruptcy estate. By contrast, the Senate and House Reports describing § 541(c)(2) refer only to continuing over the existing practice to exclude spendthrift trusts under state law.

Congress dealt with a debtor's pension plan rights in the Bankruptcy Code with clear language in § 522(d)(10)(E) as a matter of exemption. This section specifically describes ERISA benefits as an exemption limited to the debtor's reasonable needs. The Fourth Circuit's view of § 541(c)(2) effectively voids this limitation and preempts the operation of § 522(d)(10)(E).

Section 541(a) and its legislative history describe property of the bankruptcy estate with an all inclusive scope containing the debtor's property rights. The Fourth Circuit's reading of ERISA as a § 541(c)(2) exclusion thwarts the federal

interest in an expansive inclusion of property in the bankruptcy estate and does not comport with the legislative history of the Bankruptcy Code.

The view that ERISA plan benefits are an estate exclusion under § 541(c)(2) does not appear to follow the rule for changes in preCode practice stated in Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986). The preCode practice noted in the legislative history is an exclusion from the estate for spendthrift trusts. This should not be expanded to include ERISA trusts unless there is clear language in the Bankruptcy Code to do so.

In addition, if ERISA is applicable nonbankruptcy law under § 541(c)(2), it would partially invalidate § 541(a) and supercede § 522(d)(10)(E); a result prohibited under 29 U.S.C. § 1144(d).

The Fourth Circuit's view that applicable nonbankruptcy law in § 541(c)(2) is a plain term which must include ERISA is erroneous. The clear language of § 522(d)(10)(E) contradicts such a view. To follow the legislative history, harmonize § 541(c)(2) and § 522(d)(10)(E) and follow the federal preemption rule of 29 U.S.C. § 1144(d), applicable nonbankruptcy law should be limited to state spendthrift trust law.

The argument remains as to whether ERISA, by its own force, creates an omnibus bankruptcy exemption under § 522(b)(2)(A). The legislative history and § 522(d)(10)(E) reflect no such all inclusive exemption.

Section 522(b)(2)(A) covers debtor exemptions in states which "opt out" of the specific exemption in § 522 for ERISA pension benefits limited to a debtor's reasonable needs. If ERISA acts as an

omnibus federal law exemption for pension benefits under § 522(b)(2)(A), then § 522(d)(10)(E) would be preempted and rendered superfluous. This result is difficult to reconcile for the one statutory provision where Congress directly addresses ERISA benefits in the Bankruptcy Code.

As difficult to justify is the ancillary argument that an ERISA exemption exists only in the § 522(b)(2)(A) opt out states, thereby creating an inconsistent set of federal pension exemptions: a total exemption in opt out states and a "reasonable needs" exemption in all others.

The legislative history of § 522 contains no mention of ERISA as an omnibus, all inclusive federal bankruptcy exemption.

Regardless of the Court's decision on the § 541(c)(2) and § 522(b)(2)(A) questions, there should be an overriding

equitable exception to ERISA protection in bankruptcy for a debtor who controls his pension plan and can revoke it at will. In effect, no trust exists as to him and he should not be protected from the bankruptcy trustee.

The Fourth Circuit's decision should be reversed and the Trustee vested with the CFC Plan benefits as nonexempt property of the Shumate bankruptcy estate.

ARGUMENT

I. "Applicable nonbankruptcy law" under § 541(c)(2) is limited to state spendthrift trust law and does not include ERISA.

A. Background

This case reflects the deadlock existing in the courts of appeal over whether a bankruptcy debtor's interest in an ERISA qualified retirement plan becomes part of his bankruptcy estate and available

for distribution to creditors. The answer involves resolution of conflicting provisions in the Bankruptcy Code and ERISA.

ERISA requires that "each pension plan shall provide that benefits provided under the Plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1) and 26 U.S.C. § 401(a)(13)(A).[2] This Court has barred creditors' claims to a debtor's pension interest outside of bankruptcy, citing the 29 U.S.C. § 1056(d)(1) requirement. Guidry v. Sheet Metal Workers National Pension Fund, 110 S. Ct. 680 (1990).

This Court has not addressed the issue as to whether ERISA's antialienation requirement acts to thwart the trustee in bankruptcy as it would a creditor acting

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[2]Hereinafter citations to 29 U.S.C. § 1056(d)(1) will be deemed to include its statutory twin, 26 U.S.C. § 401(a)(13)(A).

under a nonbankruptcy claim. Particularly relevant to this inquiry is 29 U.S.C. § 1144(d), which appears to subordinate ERISA provisions conflicting with other federal law: "Nothing in this title shall be construed to alter, amend ... or supercede any law of the United States."

Four years after enacting ERISA, Congress repealed the Bankruptcy Act of 1898 with the Bankruptcy Reform Act of 1978 placing the Bankruptcy Code as Title 11 of the U.S. Code. Under the old Act, property of a debtor subject to the reach of his creditors in bankruptcy depended on whether a particular asset was either in alienable or leviable form. Segal v. Rochelle, 382 U.S. 375, 379 (1966). Under the new Code all the debtor's property comprises an estate in bankruptcy under § 541(a): "all legal or equitable interests of the debtor in property." Congress intended § 541(a)

to have a broad scope:

> because it includes as property of the estate all property of the debtor even that needed for a fresh start. After the property comes into the estate, then the debtor is permitted to exempt it under proposed 11 U.S.C. § 522.[3]

A debtor's bankruptcy exemptions depend on the debtor's state of residence. Under § 522(b)(1), a state may permit debtors to select the "federal exemptions" provided in § 522(d), or may "opt out" thus limiting debtor exemptions to those permitted under § 522(b)(2)(A). Virginia has opted out of § 522(d). Va. Code § 34-3.1 (1990).

Section 541(c)(2) is an adjunct to the system of first including all the debtor's

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[3]S. Rep. No. 95-989, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5868; and H.R. Rep. No. 95-595, 95th Cong., 2nd Sess., reprinted in 1978, U.S. Code Cong. & Admin. News 5963, 6324.

property in the bankruptcy estate under § 541(a) and then permitting particular exemptions under § 522. It provides an exclusion for assets which have "a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law."

This Court granted certiorari, in part, to resolve whether ERISA is applicable nonbankruptcy law under § 541(c)(2). Courts have taken four different roads to answer this query.

Three courts of appeal follow the Fifth Circuit's decision, Goff v. Taylor, 706 F.2d 574 (1983), holding applicable nonbankruptcy law is limited to state spendthrift trust law. Daniel v. Security Pacific National Bank, 771 F.2d 1352 (9th Cir. 1985), cert. denied, 106 S. Ct. 1199; Lichstrahl v. Bankers Trust, 750 F.2d 1488

(11th Cir. 1985); Regan v. Ross, 691 F.2d 81 (2nd Cir. 1982).[4] In these circuits a debtor's pension interest is excluded from the estate if the pension trust qualifies as a spendthrift trust under state law.

The Eighth Circuit in Samore v. Graham, 726 F.2d 1268, 1272 (1985), took a second road to determining that all ERISA plans are part of the estate, subject only to the exemption provisions of § 522.

Four other circuits disagree, holding § 541(c)(2) is not limited to state spendthrift trust law, but includes ERISA. Anderson v. Raine (In re Moore), 907 F.2d 1476 (4th Cir. 1990); In re Lucas, 924 F.2d 597 (6th Cir. 1991); Velis v. Kardanis, 949 F.2d 78 (3rd Cir. 1991); and Gladwell v. Harline, 950 F.2d 669 (10th Cir. 1991). These courts of appeal sanction an omnibus

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[4]Regan v. Ross involved a government plan not covered under 26 U.S.C. § 401(a).

§ 541(c)(2) ERISA exclusion from the bankruptcy estate for a debtor's pension interest without reference to the § 522 exemptions.

A few bankruptcy courts take yet a fourth road holding that applicable nonbankruptcy law in § 541(c)(2) is limited to state spendthrift trust law, but finding an omnibus ERISA exemption in bankruptcy. These decisions deem ERISA a "federal exemption" in § 522(b)(2)(A). In re Komet, 104 B.R. 799 (Bankr. W.D. Tex. 1989). This approach is another issue for which certiorari was granted and is discussed in Section II infra.

The Trustee contends the Fifth Circuit's approach in Goff is the correct road.

B. The plain meaning of § 522(d)(10)(E) contradicts reading "applicable

nonbankruptcy law" in § 541(c)(2) to include ERISA, which would effectively render § 522(d)(10)(E) superfluous.

This Court's initial decision is whether the Fourth Circuit's delineation of applicable nonbankruptcy law is correct:

> applicable nonbankruptcy law means precisely what it says: All laws state and federal under which a transfer restriction is enforceable. Nothing in the phrase applicable nonbankruptcy law suggests that the phrase refers exclusively to state law, much less the state spendthrift trust law. (Pet. App. 7a, 8a).

Is applicable nonbankruptcy law a plain term of art not subject to explanation or construction?

This underlying premise of the Fourth Circuit's opinion should be rejected from the outset. It contradicts the unmistakably plain dictate of Congress in § 522(d)(10)(E) to cover ERISA benefits as exemptions and contravenes the principle of

statutory construction against interpreting § 541(c)(2) so as to render § 522(d)(10)(E) nugatory.

Statutes should be read as a whole and not in isolated parts. United States v. Morton, 467 U.S. 826 (1984). Section 522(d)(10)(E) exists to specifically exempt "a debtor's right to receive ... a payment under a ... pension ... plan ... to the extent reasonably necessary for the support of the debtor ... unless ... such plan ... does not qualify under ... 26 U.S.C. § 401(a)".

Congress could not be any more to the point. A debtor's rights to a pension benefit, choate or inchoate, are a matter of exemption from the bankruptcy estate. In order to reach the application of an exemption, the plan benefit rights must first be included in the estate under § 541(a) in order for a § 522 exemption to be

effective.

The legislative history of the Bankruptcy Code is unequivocal that all of a debtor's interests be first included in his estate under § 541(a) and then subject to exemptions.

> The bill determines what is property of the estate by a simple reference to what interests in property the debtor has at the commencement of the case. This includes all interests ... whether or not transferrable by the debtor ... (emphasis added). These changes [from prior law] will bring anything of value that the debtors have into the estate. The exemption section will permit an individual debtor to take out of the estate that property that is necessary for a fresh start.[5]

The Commission on the Bankruptcy Laws of the United States, which prepared the draft statute which became the Bankruptcy

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[5]H.R. Rep. No. 95-595, 95th Cong., 2d Sess. reprinted in U.S. Code Cong. & Admin. News 5963, 6136.

Reform Act of 1978 including § 522, described ERISA benefits as a specific subject for exemption.

> Benefits or rights under a retirement plan are exempt under clause (6) if the plan is qualified under I.R.C. §401(a). A limit is placed on the exemption since it is recognized that members of professional corporations and officers will have very substantial benefits.[6]

Reading § 522(d)(10)(E) with § 541(c)(2) negates a conclusion that ERISA creates an exclusion from the estate by its own force under § 541(c)(2). It is a consequence unlikely to be inferred from a Congress which specifically describes ERISA benefits in § 522, but with nary a mention of ERISA in § 541 or its legislative history. The Fifth Circuit in Goff, 706

[6]Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137 93d Cong., 1st Sess., reprinted in Collier on Bankruptcy, Appendix 2, p.129 (15th ed.)

F.2d 574, 582, concluded:

> Congress did not intend to do ambiguously in Section 541 that which it clearly did not do directly in Section 522, although Section 522 explicitly addresses the extent to which other "Federal law" and retirement benefit exemptions would be recognized.

The Fourth Circuit's construction of an omnibus ERISA exclusion through § 541(c)(2) conflicts with the principle recognized by this Court of "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." Freytag v. C.I.R., 111 S. Ct. 2631, 2638 (1991). Pennsylvania Department of Public Welfare v. Davenport, 110 S. Ct. 2126, 2133 (1990).

The drafters of the Bankruptcy Code crafted a limited exemption for pension benefits in those states using the § 522(d)(10)(E) exemption. The Fourth Circuit's view renders this Section an

effective nullity. If the omnibus ERISA exclusion posited by the Fourth Circuit for §541(c)(2), stands, the clear limitations of "reasonable needs of the debtor" for debtor pension benefits in non opt out states will be void. The § 541(c)(2) exclusion will have pre-empted the plain intent of § 522(d)(10)(E); a result Congress did not intend. Further, the Bankruptcy Code's distinction between exemptions allowed under § 522(b)(2)(A) (in "opt out" states like Virginia) and those in states using the federal exemptions under § 522(d)(10)(E) would be moot if there is a superseding § 541(c)(2) exclusion taking pension benefits out of the estate before the exemption section comes into play.

As the Bankruptcy Commission report indicated above, the proposed exemption applied to benefits in ERISA plans

qualifying under § 401(a) of the Internal Revenue Code, like the CFC Plan, (as well as individual Retirement Accounts (Internal Revenue Code § 408(a) (IRC) and Employee stock ownership plans (IRC § 409)). It is these retirement plans in which deductions for employer contributions and the tax free accrual of income to the beneficiary are conditioned on the plan containing the ERISA antialienation provision. While certain charitable annuities, for which no antialienation clause is required, (IRC § 403(b)) could still be covered by § 522(d)(10)(E), the statute's intended purpose for the vast majority of private pension arrangements would be nil. Ascribing such a convoluted purpose to Congress, with the specific listing of plans covered in § 522(d)(10)(E)(iii), is difficult to fathom.

The Tenth Circuit, Gladwell v.

Harline, 950 F.2d 669 (1991) and the Third Circuit, Velis v. Kardanis, 949 F.2d 78, 181 (1991), opine that a § 541(c)(2) omnibus ERISA exclusion from the bankruptcy estate does not render § 522(d)(10)(E) superfluous by conjuring § 522 is to deal with an actual distribution from a pension plan as opposed to the debtor's rights in a pension plan. This argument ignores the plain language of § 522 and attempts to create a distinction which does not exist.

Section 522(d)(10) clearly covers a debtor's "right to receive" a distribution under a subsection E pension plan. That is exactly what the Trustee seeks to include in the Shumate estate: the right to the CFC Plan benefits. Section 522(d) makes no distinction between payments being made to a debtor and the debtor's other rights to the funds whether present or future. Surely the legislative history of the

Bankruptcy Code would describe such a bifurcated scheme for a debtor's pension interests, if one were to exist, but no mention is found in the House or Senate Reports, much less the statute.

Applicable nonbankruptcy law should not be read to include ERISA in § 541(c)(2). To do so ignores the plain language of the Bankruptcy Code dealing with ERISA benefits as a matter of exemption under § 522(d)(10)(E) and by implication, § 522(b)(2)(A). The Fourth Circuit's view would also render § 522(d)(10)(E) essentially superfluous, contrary to the rules of statutory construction.

C. "Applicable nonbankruptcy law" is an ambiguous term requiring further examination to establish proper application in § 541(c)(2).

This Court has recognized there can be substantial ambiguity in similar terms used within the same Bankruptcy Code section, thus requiring more than a cursory reading of a term like applicable nonbankruptcy law. Dewsnup v. Timm, No. 90-741, 60 U.S.L.W. 4111, 4113 (decided January 15, 1992). Applicable nonbankruptcy law is a nebulous term, inherently ambiguous, particularly when taken in the context of the interplay of § 541 and § 522. As this Court indicated in King v. St. Vincent's Hospital, 112 S. Ct. 570, 574 (1991), "the meaning of statutory language, plain or not, depends on context."

Applicable nonbankruptcy law is not explained in the Bankruptcy Code definitional statute, § 101. In sections other than § 541(c)(2), its meaning is malleable according to the context. Applicable nonbankruptcy law appears at §

1125(d) (regarding securities law for disclosure statements) and § 108 (regarding statutes of limitation) where it can be read to include federal and state law. Based on the maxim "a word is presumed to have the same meaning in all subsections of the same statute," the Fourth Circuit concluded applicable nonbankruptcy law must mean federal and state law throughout the Bankruptcy Code. In re Moore, 907 F.2d 1476, 1478.

That conclusion ignores applicable nonbankruptcy law is limited to state law in other Bankruptcy Code sections. For instance, § 522(b)(2)(B) exempts tenancy by the entireties property under applicable nonbankruptcy law from the bankruptcy estate. Only state law defines such tenancies in property. There is no federal law to do so. Applicable nonbankruptcy law is here clearly limited to state law.

This dichotomy, with differing meanings for the same term within related sections of the Bankruptcy Code, justifies further inquiry to determine the intended scope for applicable nonbankruptcy law under § 541(c)(2).

In United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 243 (1989), this Court discussed the need for further inquiry if the apparent literal application of a statute produced a result at odds with the intention of the drafters. Assuming solely for the purposes of argument that applicable nonbankruptcy law in § 541(c)(2) is a "plain" term encompassing all law, state and federal, this inquiry is in order where such a reading conflicts with:

1. other sections of the Bankruptcy Code (§ 541(c)(2) and 522(d)(10)(E)); or

2. an important federal interest (the

intended broad inclusion of assets in the bankruptcy estate); or

3. where a contrary view is shown by the legislative history.

All three circumstances are present in this case. If ERISA is applicable nonbankruptcy law under § 541(c)(2), a conflict exists with § 522(d)(10)(E) as described above.

Finding a comprehensive ERISA exclusion under § 541(c)(2) also frustrates a key purpose of the Bankruptcy Code: to include all assets of the debtor in the bankruptcy estate with exemptions later determined.[7] This Court has recognized the importance of this inclusive scope for the bankruptcy estate. United States v. Whiting Pools, 462 U.S. 198, 204 (1983). The omnibus ERISA exclusion advocated by

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[7]See supra notes 3, 5.

the Fourth Circuit for § 541(c)(2) contravenes this federal interest in an expansive bankruptcy estate.

Senate and House Reports accompanying the Bankruptcy Reform Act narrowly focus any exclusion under 541(c)(2) to one which "preserves restrictions on transfer of a spendthrift trust".[8] The House Report is very direct:

> The bill also continues over the exclusion of property from the estate of the debtor's interest in a spendthrift trust to the extent that the trust is protected from the creditors under applicable state law."[9]

It seems unmistakable from the legislative history that, but for the

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[8]H.R. Rep. No. 95-595, 95th Cong. 2d Sess., reprinted in U.S. Code Cong. & Admin. News 5963, 6325; and S. Rep. No. 95-989, 95th Cong., 2d Sess., reprinted in U.S. Code Cong. & Admin. News 5787, 5869.

[9]H.R. Rep. No. 95-595, 95th Cong. 2d Sess. reprinted in U.S. Code Cong. & Admin. News 5963, 6136.

exemptions permitted under § 522, Congress intended only a narrow exclusion from the estate limited to the preCode practice for spendthrift trusts under state law.

Even if applicable nonbankruptcy law in § 541(c)(2) could be initially read with the "plain meaning" the Fourth Circuit asserts, the Trustee, nevertheless, has met the test for further inquiry under Ron Pair Enterprises, Inc.. Interpreting applicable nonbankruptcy law as state spendthrift trust law eliminates the conflict between § 541(c)(2) and § 522(d)(10)(E), affirms the congressional intent for an expansive scope to the bankruptcy estate under § 541(a), and comports with the legislative history of the Bankruptcy Code.

D. An all encompassing ERISA exclusion from the bankruptcy estate is a variance from preCode practice without clear

congressional intent for such a change.

This Court has enunciated a rule of construction in bankruptcy cases where an interpretation of the Bankruptcy Code purports to change preCode practice. Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986); Kelly v. Robinson, 479 U.S. 36 (1986). Justice O'Conner described the rule in United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 252 (1989).

> The rule of Midlantic is that bankruptcy statutes will not be deemed to have changed preCode law unless there is some indication that Congress thought it was effecting such a change.

While there appear to be no cases between the enactment of ERISA in 1974 and the Bankruptcy Code in 1978, which deal with ERISA trusts under the Bankruptcy Act,

the legislative history of the Bankruptcy Code describes preCode practice in terms of state law spendthrift trusts.

The new Code "continues over"[10] the existing practice limited to spendthrift trusts. This preCode protection honored the wishes of the settlor of a trust who wished to provide for a beneficiary otherwise unable to care for his assets: "The bankruptcy of the beneficiary should not be permitted to defeat the legitimate expectations of the settlor of the trust."[11]

Finding a preCode practice as to spendthrift trusts meets the first half of the Midlantic test. "The second step under Midlantic is to look for some indicia that Congress knew it was changing preCode law."

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[10]See Supra notes 7, 8.

[11]See supra, note 9.

Ron Pair Enterprises, Inc., 489 U.S. 235, 254.

The Bankruptcy Code and ERISA are silent as to any plain statutory directive that ERISA is to be deemed spendthrift trust law for purposes of an estate exclusion. The legislative histories of both statutes are devoid of a description manifesting a congressional intent to change preCode practice to include ERISA within the ambit of the "continued over" spendthrift trust protections. If expanding the narrow exclusion from the bankruptcy estate for spendthrift trusts to include ERISA was intended, surely the legislative history would make some reference to such a change for the new Code.

E. The Bankruptcy Code overrides a conflicting ERISA provision under 29 U.S.C. § 1144(d).

ERISA's state law pre-emption provision, 29 U.S.C. § 1144(a), is offset by a collorary in 29 U.S.C. § 1144(d) regarding federal law:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supercede any law of the United States....

Section 541(a) reflects the congressional intent to include all of a debtor's assets in his bankruptcy estate even if the debtor is restricted in his ability to transfer such property.[12] The debtor's trustee in bankruptcy acquires entitlement to the debtor's property, subject to any § 522 exemptions. In this case, the Trustee steps into Shumate's entitlement to the lump sum distribution from the terminating CFC Plan. To hold 29

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[12]See supra note 8.

U.S.C. § 1056(d)(1) as a bar to inclusion of Shumate's pension benefits in his bankruptcy estate would be to write in a bankruptcy exception to 29 U.S.C. § 1144(d) which does not exist.

Shumate may argue that Guidry v. Sheet Metal Workers National Pension Fund, 110 S.Ct. 680, rejected a 29 U.S.C. § 1144(d) claim regarding a debtor's pension interest under 29 U.S.C. § 501, the Labor Management Relations Act (LMRA), and should control in this case. Such an argument is defective.

Guidry dealt with a claim in a nonbankruptcy setting. The creditor's (a labor union) claim was for an equitable constructive trust for that creditor on the defalcating former union official's pension entitlements based on the LMRA's authorization of a cause of action for the benefit of a labor organization. This Court saw the cause of action granted under

LMRA as unmodified by the pension plan's ERISA required antialienation provision limiting recovery out of the pension plan. The LMRA provision was too general to be altered or amended by the ERISA antialienation bar which applies, outside bankruptcy, to stop collection of a judgment, but does not cut off the cause of action to obtain a judgment. Accordingly, there was no conflict between the LMRA and 29 U.S.C. § 1144(d).

Significantly, this Court declined to rule on whether 29 U.S.C. § 1109(a), which requires a faithless pension plan fiduciary "to make good to such plan any losses" supercedes the bar on alienation under 29 U.S.C. § 1056(d)(1).

The case at bar, by contrast, does involve bankruptcy. The inclusive scope of § 541(a), unlike the general right to a cause of action in the LMRA, does conflict

with 29 U.S.C. § 1056(d)(1). The ERISA provision is sublimated to § 541(a) or else it will impair and supercede the Bankruptcy Code's provision for a bankruptcy estate inclusive of all the debtor's property rights. That the Bankruptcy Code was adopted after ERISA makes it more difficult to argue § 541(a) should give way to 29 U.S.C. § 1056(d)(1). See Sutherland Stat. Const. § 51.02 (5th ed.).

The protection from creditors for ERISA benefits, which is available outside bankruptcy, is one of the property rights a debtor surrenders to his trustee when he decides to take the benefits afforded him by filing bankruptcy.

F. The applicable nonbankruptcy law, Virginia spendthrift trust law, does not afford Shumate's CFC Plan benefits protection from the Trustee.

The district court's determination that Virginia spendthrift trust law did not protect Shumate's CFC Plan benefits from the Trustee is sound. With 96% of the CFC stock, Shumate could appoint the corporate directors (or change the corporate structure) at anytime, without cause or limitation, thus directing termination of the CFC Plan at will. (J.A. 157, Vol. I, and 475, Vol. II). Shumate would receive not only his own account interest (by far the largest in the CFC Plan), but the value of the plan reversion.

The district court, uncontradicted by the Fourth Circuit, determined Virginia law would not honor spendthrift protection with Shumate's dominion and control over the CFC Plan. (Pet. App. 30a - 38a). In re O'Brien, 50 B.R. 67 (B.C.E.D. Va. 1985); Petty v. Moores Brook Sanitarium, 110 Va. 815, 67 S.E. 355 (1910). Shumate's

unfettered control over the CFC Plan vitiates the intended protection of a spendthrift (antialienation) provision as he in effect becomes settlor and beneficiary through his revocation powers.

Shumate's claim that the NCNB loan agreement abrogated his control over the CFC Plan is without merit. The agreement was with CFC, not the CFC Plan. Once the CFC Plan was terminated, Shumate would have received the benefit of the value of the plan reversion either as an increase in the value of his equity or a diminution of his obligation to NCNB. Even if the restriction on dividends were applicable, it would simply extend a lump sum dividend to Shumate into payments over several years. Moreover, as the district court observed: "Shumate would be estopped from asserting an act of his own will as a bar to an exercise of power he lawfully

possessed. See Restatement (Second) Agency § 8B (1934)." (Pet. App. 40a, 41a).

Applicable nonbankruptcy law in § 541(c)(2) is limited to state spendthrift trust law. The applicable law of Virginia voids any spendthrift protection Shumate might otherwise enjoy because of his revocation power over the CFC Plan.

II. ERISA does not create a federal exemption in bankruptcy under 11 U.S.C. § 522(b)(2)(A).

The Fourth Circuit declined to render an opinion on whether ERISA constitutes a federal exemption under § 522(b)(2)(A) so as to categorically exempt pension benefits in an ERISA qualified plan from the debtor's bankruptcy estate. (Pet. App. 16a). The Third, Fourth, Sixth and Tenth Circuits omitted decision on this question as their determination that ERISA was an applicable nonbankruptcy exclusion under §

541(c)(2) made the query moot. Assuming, however, this Court concurs with the Trustee that applicable nonbankruptcy law under § 541(c)(2) does not include ERISA, the exemption question is to be resolved.

Section 522(b)(2)(A) provides that a debtor may exempt "any property that is exempt under federal law, other than subsection (d) of this section, or state ... law ...." Shumate may argue that ERISA's antialienation provision, 29 U.S.C. § 1056(d)(1), creates a barrier to creditors outside bankruptcy and since this barrier is erected by a federal statute, it should follow this is a federal exemption.

The Trustee believes no omnibus ERISA exemption exists under § 522(b)(2)(A). Such an exemption would either render § 522(d)(10)(E) without a purpose or create inconsistent federal pension exemptions in bankruptcy. It is also contrary to the

legislative history of § 522.

To read an ERISA exemption into 11 U.S.C. § 522(b)(2)(A) only would make the provision for pension exemptions within the statute inconsistent. There would be two federal law pension exemptions: a complete exemption in "opt out" states and a reasonable needs exemption in others. This seems an unlikely course, particularly since § 522 is written to provide a single set of federal exemptions unless a state elects otherwise as both floor leaders for the Bankruptcy Reform Act, Representative Don Edwards and Senator Dennis DeConcini, explained.[13]

If Shumate was a resident of a non optout state, so as to be restricted to the

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[13]H.R. Rep. No. 95-595, 95th Cong., 2d Sess., reprinted in U.S. Code Cong. & Admin. News 6436, 6455, and S. Rep. No. 95-989, 95th Cong., 2d Sess., reprinted in U.S. Code Cong. & Admin. News 6505, 6521.

exemptions under § 522(d), his CFC Plan benefit would be exempt only "to the extent reasonably necessary for the support of the debtor ...." If ERISA creates an omnibus exemption, then the § 522(d) reasonable needs limitation would be ineffective. If ERISA is "federal law" and creates a full exemption under 11 U.S.C. § 522(b)(2), how can that be squared with the clear limitation on ERISA benefits for the debtor who is restricted to the § 522 exemptions? The reconciliation is that ERISA is not one of the intended federal exemptions in bankruptcy under § 522(b)(2)(A).

The legislative history of the Bankruptcy Reform Act does not describe an all encompassing ERISA exemption in § 522. On the contrary, the House and Senate Reports list federal exemptions for § 522(b), but ERISA is omitted.[14] The included statutory exemptions, such as social security payments, all contain specific statutory prohibitions against alienation. In contrast, ERISA provides that the pension plan trust contain an antialienation clause; it does not state a direct statutory prohibition.

The Fifth Circuit, by strong dicta in Goff, 706 F.2d 574, 585 (1983), critically reviewed what Congress intended for § 522(b)(2)(A).

> The failure of Congress to include ERISA in its listing of illustrative federal statutes is highly probative of congressional intent that ERISA was not within the group of "federal law" based exemptions... Congress knew of the previously-enacted ERISA when drafting Section 522(b)(2)(A), yet neither the House nor the Senate deemed fit to include it within their

[14] S. Rep. No. 95-989, supra, at 5861, and H.R. Rep. No. 95-595, supra at 6316.

respective illustrative lists, Congress did refer to ERISA where it wanted to do so in other provisions of the Code. Of similar relevance is the specific reference in another subsection of Section 522 itself to the very ERISA provision relied upon by appellants as constituting a "Federal law" exemption... Certainly, therefore, Congress did not "overlook" ERISA. Given the extensive and general reach of ERISA-qualified plans, it is highly improbable that Congress intended their inclusion without mention in the Section 522(b)(2)(A) exemption in the midst of a listing of significantly less comprehensive and less well known statutes. The often-stated admonition that it may be treacherous to attach great weight to congressional silence in interpreting its laws does not apply in this case in light of the comprehensive consideration of this issue which is revealed by this history....

Section 522 contemplates a state law determination of exemptions. To read a federal ERISA exemption into § 522(b)(2)(A) would either render § 522(d)(10)(E) superfluous or establish an inconsistent

set of federal law pension exemptions. Combined with the persuasive legislative history that omits ERISA as a federal exemption, it seems apparent there is no omnibus ERISA exemption in bankruptcy under § 522(b)(2)(A).

III. Longstanding public policy prohibits a trust beneficiary with dominion, control and the right to terminate the trust in which he has an interest, from sheltering that asset from his creditors.

In McLean v. Central States Pension Fund, 762 F.2d 1204, 1207 (1985), the Fourth Circuit appeared to endorse the proposition of an overriding public policy which could void the antialienation protection of a debtor's retirement interest in bankruptcy.

> The pension fund is not one of those which because settled and revocable by a beneficiary, may

> not on that account for public policy reasons be protected against the claims of the beneficiary's creditors by antiassignment provisions.

The district court below relied on this public policy, citing McLean, that a trust beneficiary with control so as to revoke a trust at will and receive the assets would not be protected from his creditors. (Pet. App. 29a). Shumate had that type of all pervasive control which Virginia spendthrift trust law would not protect. In such cases, the district court determined, "Public policy demands that debtors not be allowed access to their funds to the detriment of creditors." (Pet. App. 36a).

Although the Court declined to make an equitable exception in Guidry v. Sheet Metal Workers National Pension Fund, 110 S. Ct. 680, 687 (1990), to the nonbankruptcy protection offered by 29 U.S.C. §

1056(d)(1), the effectively self settled trust is a different case.

The debtor's control and revocation power strikes at the heart of antialienation protection ERISA purports to give. In reality no trust exists as to Shumate as it is in his total discretion to keep or revoke the trust. The Guidry protection should not apply where the trust is effectively a sham as to the debtor.

Otherwise, debtors like Shumate can manipulate retirement funds which they can drain of assets to the exclusion of creditors once bankruptcy is filed. There is no requirement Shumate use any of the funds from the CFC Plan for retirement; he can use the funds as he wishes. It seems unlikely Congress would draw ERISA to protect retirement, craft the Bankruptcy Code as all inclusive of a debtor's property, but yet allow a debtor like

Shumate to control and direct a large retirement fund which he could exempt from creditors and then use upon termination as he so chooses.

CONCLUSION

The Fourth Circuit's decision should be reversed. Applicable nonbankruptcy law in § 541(c)(2) is a reference to state spendthrift trust law and does not confer the protection of ERISA's antialienation bar on a debtor in bankruptcy. The applicable state law of Virginia does not approve spendthrift trust protection for a debtor, like Shumate, who had complete dominion, control and revocation power over the trust for his benefit.

Shumate's interest in the CFC Plan is not exempt under § 522(b)(2)(A). ERISA does not constitute a stand alone federal exemption in bankruptcy. Finally, Shumate's interest in the CFC Plan should

be an equitable exception to the antialienation requirement of ERISA because Shumate is effectively the settlor and beneficiary of the trust through his revocation power over it.

The Trustee respectfully submits that the decision of the Court of Appeals be reversed and judgment entered in favor of the Trustee that he is entitled to Shumate's CFC Plan benefits as a nonexempt asset of the bankruptcy estate.

Respectfully submitted,

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